92-649

NO.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

DANA SCHUMACHER AND LEROY HODGE,

PETITIONERS

v.

ROBERT N.C. NIX, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Pennsylvania may bar attorneys from other states from practicing law in Pennsylvania when Pennsylvania has determined that those attorneys are competent to take the Pennsylvania Bar Examination, but nonetheless disqualifies them from taking the examination for reasons that have nothing to do with the attorneys' competence or fitness to practice law in Pennsylvania?

2. Whether the State's reciprocity interest set forth by the Court of Appeals in upholding Pennsylvania's classification scheme represents a legitimate state interest that may reasonably have been the purpose or policy of the Pennsylvania Supreme Court?

II

PARTIES TO THE PROCEEDINGS

The Petitioners are Dana Schumacher and Leroy Hodge.

The Respondents are Robert N.C. Nix, Jr., Chief Justice of the Supreme Court of Pennsylvania, Rolf Larson, Justice of the Supreme Court of Pennsylvania, John P. Flaherty, Justice of the Supreme Court of Pennsylvania, James T. McDermott, Justice of the Supreme Court of Pennsylvania, Stephen A. Zappala, Justice of the Supreme Court of Pennsylvania, Nicholas P. Papadakos, Justice of the Supreme Court of Pennsylvania, Ralph J. Cappy, Justice of the Supreme Court of Pennsylvania, and Patrick Tassos, Executive Director of the Pennsylvania Board of Law Examiners.

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v.

ROBERT N.C. NIX, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Jules Lobel, Esq., on behalf of Dana Schumacher and Leroy Hodge, petitioners for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Court of Appeals opinion at issue here (App. A, a1-a28) is reported at 965 F.2d 1262. The District Court's opinion in this case (App. B, a29-a47) and the Magistrate's report (App. C, a48-a72) are unreported.

JURISDICTION

The judgment of the Court of Appeals (App. E, a75-a76) was entered on June 3, 1992. A timely petition for rehearing was denied on July 8, 1992 (App. D, a73-a74). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment, the Article IV Privileges and Immunities Clause and the Relevant Pennsylvania Bar Admission Rules are reproduced at App. F, a77 and App. G, a78-a82.

STATEMENT

1. This case arises out of a Pennsylvania Bar Admission Rule that bars certain attorneys from practicing law in Pennsylvania who are experienced, capable

and accomplished practitioners in other states and whom Pennsylvania has determined are competent to take its bar examination. Pennsylvania will not permit these attorneys to take its bar examination simply because the state in which they practiced law does not allow attorney applicants from Pennsylvania to be admitted to its bar without passing an examination.

Petitioners Dana Schumacher and Leroy Hodge are attorneys who are admitted to the bar of California and practiced law continuously in California for over five years. Both attended a law school that was not accredited by the American Bar Association. Both have taken and passed the California Bar Examination. In addition to being members in good standing of the Bar of California, Schumacher and Hodge have also been admitted to the U.S.

District Courts for the Central District of California, the Western District of Pennsylvania, the U.S. Court of Appeals for the Ninth and Third Circuits and the U.S. Supreme Court.

Petitioner Schumacher moved to Pennsylvania in 1987 to live with her husband, who had procured employment in Pennsylvania. She applied to sit for the Pennsylvania Bar Examination in 1988, and her application was denied by the Pennsylvania Board of Law Examiners. Petitioner Hodge has not applied for permission to sit for the Pennsylvania Bar Examination because he believes it would be futile.

2. The Pennsylvania Bar Rules provide that recent law graduates must have graduated from an ABA-approved law school in order to take the Pennsylvania Bar Examination. Pa. Bar 203(a)(2)(i). (App.

G, a78) However, Pennsylvania has also determined that experienced attorneys who are graduates of unaccredited law schools are qualified to take the Pennsylvania bar. Pa. Bar 203(a)(2)(ii) (App. G, a78-a79). Despite Pennsylvania's recognition that experienced lawyers who are graduates of non-ABA accredited law schools are competent to take its bar examination, the state does not allow all such out-of-state attorneys do so. Pennsylvania Bar Rule 203(a)(2)(ii) provides that attorneys who are members in good standing of the bar of and have practiced law in another state for more than five years may take the Pennsylvania Bar Examination, provided that the other state is a *reciprocal* state. Reciprocal state is defined as a state having a reciprocal agreement or arrangement with Pennsylvania concerning admission to the

bar. (App. A, a4-a5) As the Court of Appeals determined, "in practice, the Pennsylvania Board of Law Examiners has accorded reciprocal status to those states which permit experienced Pennsylvania attorneys who are graduates of accredited law schools to waive into their bar without taking an examination." (App. A, a5)

California does permit attorneys from other states who attended non-ABA accredited law schools to take its bar examination. However, California does not allow attorneys from other states who are graduates of accredited law schools to waive into its bar without taking an examination. Therefore, California is not considered by Pennsylvania to be a "reciprocal" state for purposes of Pennsylvania Bar 203(a)(2)(ii). Since California is not a reciprocal state under

Pennsylvania's rules, Petitioner Schumacher was denied permission to sit for the Pennsylvania Bar Examination, despite the fact that she met the competency and fitness requirements of Rule 203(a)(2)(ii). Had she practiced law in the reciprocal state of West Virginia she would have been permitted to sit for the bar examination.

3. On August 29, 1990, Schumacher filed a complaint for declaratory and injunctive relief in the United States District Court for the Western District of Pennsylvania claiming that Pa. BAR Rule 203 violated the Equal Protection, Due Process and Privileges and Immunities Clauses of the United States Constitution. On December 26, 1990, a second amended complaint was filed in which Leroy Hodge was added as a plaintiff.

The parties' cross-motions for summary judgment were referred to Magistrate Lancaster. On May 20, 1991, the Magistrate issued his report recommending that defendants' motion for summary judgment be granted. The Magistrate concluded that the classification contained in Rule 203(a)(2)(ii) between graduates of non-ABA accredited law schools who practiced law in a non-reciprocal state and those who practiced in a reciprocal state was not related to the state's interest in assuring a competent bar. The Magistrate did conclude that the Rule was "rationally related to a valid state objective, i.e., gaining the mutual benefit for Pennsylvania's similarly educated attorneys." (App. C, a65)

On August 27, 1991, after considering written objections to the Magistrate's

report, the District Court granted defendants' motion for summary judgment.

(b) Plaintiff appealed to the Court of Appeals, which affirmed the District Court. The Court of Appeals found that plaintiff's right to travel was not implicated and that therefore rational basis review applied. The Court also concluded that Pennsylvania had determined that attorneys having petitioners' qualifications were competent to take its bar examination and that therefore Rule 203(a)(2)(ii) was not related to the state's interests in assuring a competent bar. (App. A, a19, n.11) The Court then held that Rule 203(a)(2)(ii) was rationally related to a legitimate governmental interest in securing advantages for its attorneys who seek to practice elsewhere. The Court however disagreed with the Magistrate's holding

that Pennsylvania's rules rationally furthered the state's objective in gaining a "mutual benefit for Pennsylvania's similarly educated attorneys." The Court of Appeals found that the challenged rule did not further mutual treatment for similarly educated attorneys in that "it is difficult to glean any nexus between whether a state has reciprocity with Pennsylvania and whether it accords mutual treatment to Pennsylvania attorneys who are graduates of unaccredited law schools." (App. A, a22) There is simply no factual correlation between whether a state is "reciprocal" and whether it would allow Pennsylvania attorneys who are graduates of unaccredited law schools to become members of their bar, *id.* Thus, the Court of Appeals concluded that the Board of Law Examiners has "conditioned the grant of reciprocal status on whether

a state accords mutual treatment to Pennsylvania attorneys who are graduates of accredited law schools without regard to whether that state accords mutual treatment to Pennsylvania attorneys who are graduates of unaccredited law schools." (App. A, a23)

The Court of Appeals, however, articulated another state reciprocity interest rationally furthered by Rule 203(a)(2)(ii), an interest explicitly rejected by the Magistrate as "totally unfounded in the record," (App. C, a68-a69) and never argued by the defendants in the courts below. The Court found that, by denying graduates of unaccredited law schools who practiced law in non-reciprocal states the opportunity to take the Pennsylvania Bar Examination, Pennsylvania was hoping to "entice" those states into allowing experienced

Pennsylvania's attorneys who graduated from ABA accredited law schools to become members of their bar without taking any examination. (App. A, a25) Since the Rule served this "reciprocity" interest, the Court of Appeals affirmed the District Court's grant of defendant's motion for summary judgment. On July 8, 1992, the Court denied the plaintiff's petition for rehearing and suggestion for rehearing en banc. (App. D, a73-a74)

REASONS FOR GRANTING THE PETITION

1. This Court should grant the petition for writ of certiorari because the Court of Appeals decision conflicts with this Court's decisions in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 257 (1974) and *Attorney General of New York v. Soto-*

Lopez, 476 U.S. 898 (1986). The Court of Appeals decision also conflicts with the right to travel analysis contained in several Court of Appeals and District Court decisions, *Lowrie v. Goldenhersh*, 716 F.2d 401, 412, 414 (7th Cir. 1983); *Shenfield v. Prather*, 387 F. Supp. 676, 685-86 (N.D. Miss. 1974); *Goldsmith v. Pringle*, 399 F.2d Supp. 620, 625 (D. Col. 1975).

The Court of Appeals has held that a state may bar an attorney from another state from practicing law in its state even where the state agrees that the attorney possesses the necessary competency and fitness to take its bar examination. That ruling strikes at the fundamental precepts of our nation as a federal union. Indeed "[I]t is difficult to imagine a right more essential to the Nation as a whole than the right to

establish residence in a new State." *Zobel v. Williams*, 457 U.S. 55, 76-77 (J. O'Connor, concurring). Yet the Court of Appeals decision permits Pennsylvania to force an experienced lawyer from another state to choose between moving with her family to establish residence in Pennsylvania, and retaining her profession. It permits Pennsylvania to force such a draconian choice on petitioners even though the State agrees that they possess the necessary competency and fitness requirements to take the state bar examination.

(a) In *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) this Court held that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a

rational connection with the applicant's fitness or capacity to practice law." (emphasis added). The Court of Appeals recognized that Rule 203(a)(2)(ii) "evinces an administrative judgment that graduates of unaccredited law schools who are members in good standing of the bar of another state and have practiced law there for five years are competent to practice law if they pass the Pennsylvania bar examination." (App. A, a19, n.11).[1] Yet the Court held that Pennsylvania's reciprocity interest was a legitimate reason to deny petitioners the opportunity to take the bar examination and practice law in Pennsylvania. The Court of

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[1]Steven Bosch, the former Secretary to the Board of Law Examiners had testified to that effect. Bosch Deposition (C.A. App. 63-64).

Appeals' ruling directly conflicts with this Court's decision in *Schware*.

(b) The Court of Appeals decision, reflecting difficulties it and other lower courts have had in applying this Court's right to travel analysis, apparently believed that this Court's right to travel cases only requires heightened scrutiny when the challenged classification is based on residency. (App. A, a12) However, this Court has on several occasions stated that heightened scrutiny is appropriate where a statutory classification "penalize[s]" or "actually deters travel," or "when impeding travel is its primary objective." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion). *See also id.* at 920-21 (J. O'Connor, dissenting) (articulating test); *Memorial Hospital v. Maricopa County*, 415 U.S. 250,

257 (1974). Thus, statutory classifications that severely burden or actually deter the exercise of one's ability to relocate implicate the right to travel and demand heightened scrutiny. *Attorney General of New York v. Soto Lopez, supra* 476 U.S. at 907-909 (permanent deprivation of a significant benefit operates to penalize appellees for exercising their right to migrate); *Memorial Hospital v. Maricopa County, supra* 415 U.S. at 257. Compare with *Sosna v. Iowa*, 419 U.S. 393, 410 (1975) (the "gravamen" of prospective divorcee's claim, "is not total deprivation . . . but only delay."). *See also Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 921 (J. O'Connor, dissenting) ("it is fair to infer that something more than a negligible or minimal impact on the right

to travel is required before strict scrutiny is applied").

The record before the Court of Appeals--ignored by that Court--clearly indicated that even persons with substantial family ties to Pennsylvania will be severely deterred from relocating if it means giving up a profession that they have practiced for many years.[2] Indeed, Schumacher will in all likelihood be forced to leave the state if she is not permitted to sit for the Pennsylvania Bar Examination.[3] To require experienced

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[2]Stephen Clare, a California attorney who graduated from a non-ABA accredited law school in California, asserts that, despite growing up in the Pittsburgh area where his parents and brother and sister currently reside, he decided not to relocate to Pittsburgh, in large part because of Rule 203(a)(2)(ii), Clare Declaration (C.A. App. 84-85).

[3]At present, Schumacher is employed by Pittsburgh Neighborhood Legal Services. Because she is not admitted to the Bar of Pennsylvania, she is confined to participating in administrative hearings. Her supervisors at Neighborhood Legal Services Association have informed her that, while they consider her to be a capable, competent and

attorneys from another state to forego their profession, or fully ignore their professional development and experience and begin all over as a first year law student certainly does not merely incidentally hinder travel but "actually deters" or substantially deters those attorneys' relocation to another state. To totally deny competent attorneys the right to practice his or her profession is certainly as great a penalty or deterrent as those found in prior right to travel cases and constitutes an undue burden on petitioners' right to travel, which should require heightened equal protection scrutiny of the state's classification.

While the Court of Appeals correctly noted that the Constitution does not

ethical attorney who is well qualified to practice law in Pennsylvania, they will probably have to terminate her employment unless she can become admitted to the Pennsylvania Bar. If that occurs she will probably leave the state. Schumacher Declaration (C.A. App. 86-87).

"require that because a lawyer has been admitted to the bar of one state, he or she must be allowed to practice in another" (citing *Leis v. Flynt*, 439 U.S. 438, 443 (1979) (App. A, a13), that is not petitioners' claim here. Petitioners do not question Pennsylvania's right to maintain whatever qualifications it believes are necessary to ensure a competent and ethical bar, even if those requirements exclude attorneys from other states. Petitioners argue merely that an out-of-state attorney who meets Pennsylvania's character and fitness requirements cannot be totally precluded from practicing in Pennsylvania for reasons unrelated to his or her fitness or capacity to take the state bar examination. Only such competency or fitness concerns constitute a sufficient government interest to justify the

substantial interference with a person's ability to relocate caused by barring a professional from even taking an examination to be admitted to practice in the state to which he or she seeks to relocate. Here, as the Court of Appeals found, Pennsylvania has determined that plaintiffs are competent to take the bar examination. As this Court said in *Schware v. Board of Bar Examiners, supra* 353 U.S. at 239, "[c]ertainly the practice of law is not a matter of the state's grace." *Schware, supra*, at 239. *See also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985) (opportunity to practice law is a fundamental right for purposes of Privileges and Immunities Clause).

(c) The rationale of other Court of Appeals and District Court rulings affirming various state bar admission

rules conflicts with the Third Circuit's opinion in this case. Those other courts have explicitly distinguished between totally barring a class of attorneys from practicing law in the state and simply requiring them to take an examination. *Lowrie v. Goldenhersh*, 716 F.2d 401, 412, 414 (7th Cir. 1983); *Shenfield v. Prather*, 387 F. Supp. 676, 685-86 (N.D. Miss. 1974); *Goldsmith v. Pringle*, 399 F. Supp. 620, 625 (D. Colo. 1975). These cases implicitly hold that a total bar would implicate a lawyer's right to travel and thus require heightened scrutiny. *See e.g. Shenfield v. Prather, supra* 387 F. Supp. at 686 ("[T]he ability to practice law without undergoing an examination of professional competence--is not sufficiently vital to infringe the plaintiff's fundamental right to travel."). For example, in *Lowrie v.*

Goldenhersh, *supra* 716 F.2d at 412, the Seventh Circuit held that a "critical difference" existed between rules resulting in "absolute barriers to bar admission" and those that simply require applicants to take and pass the bar examination.[4] The Third Circuit here obliterated that critical distinction.

(d) Pennsylvania Bar Rule 203 also violates the Privileges and Immunities Clause of Article IV of the Constitution. Pennsylvania distinguishes among attorneys whom it considers competent to take the Pennsylvania Bar Examination, permitting

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[4]This Court has, in a wide variety of contexts, recognized the distinction between a total bar and lesser burdens on an individual's ability to engage in a particular activity. *Compare* Plyler v. Doe, 457 U.S. 202 (1982), *with* San Antonio School District v. Rodriquez, 411 U.S. 1 (1973). *See also* Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 378-79 (1976) (striking down a reciprocity provision that prohibited the sale of out-of-state milk products in Mississippi unless the sister state accepted Mississippi's milk on a reciprocal basis).

all such attorneys to take the examination except out-of-state attorneys who attended non-ABA accredited law schools and who practiced law in non-reciprocal states. While it is theoretically possible that some attorneys in petitioners' class are residents of Pennsylvania and practice law in a neighboring non-reciprocal state, it is clear that the overwhelming percentage of the attorneys who attended non-ABA accredited law schools and practice law in a non-reciprocal state are not residents of Pennsylvania.[5] Thus, as a practical matter, for Pennsylvania to permit all

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[5]Since Ohio, Virginia, West Virginia and New York are reciprocal states, and New Jersey does not permit non-ABA accredited law school graduates to practice law, the only plausible State which might contain attorneys similarly situated to petitioners who reside in Pennsylvania is Maryland. (App. A, a22-a23, n.13-15) The only other means by which a person could be a resident of Pennsylvania and be barred by Rule 203(a)(ii)(2) is if like petitioners here, they relocate to Pennsylvania after having practiced law in a non-reciprocal state. Given petitioners experience, that is an extremely unlikely possibility in the future.

attorneys or law graduates whom it deems competent to practice law in Pennsylvania to take its bar examination except this one group is a classification based on residency and violates the Privileges and Immunities Clause of Article IV. This is particularly true when the purpose of Rule 203 articulated by the Court of Appeals is precisely to discriminate against certain out-of-state residents to entice the States in which these residents reside to grant favorable treatment to Pennsylvania residents.

(e) The conflict between Pennsylvania Rule 203(a)(2)(ii) and the nature of our federal union is further illustrated by comparing Pa. Bar 203 and Pa. Bar 205. Rule 205 allows United States citizens and foreigners who are graduates of foreign law schools to take the Pennsylvania Bar Examination after having completed 24

credit hours in an accredited American law school. (App. G, a81-a82)

Pennsylvania Rules 203 and 205 discriminate against certain domestic law graduates as opposed to foreign law graduates in two respects. First, Rule 205 does not require that the foreign state grant reciprocity to U.S. lawyers in order to obtain a benefit for graduates of its law schools. It thus treats the sister state of California more harshly than a foreign country, an apparently irrational result inconsistent with the Federal Union.

Second, the Rules totally bar *experienced* attorneys who have practiced in a sister state, yet provide more liberal treatment to graduates of foreign law schools who have never practiced law but simply attended law schools abroad and were admitted to the bar, or in some cases

(involving U.S. citizens) were never even admitted. Had Petitioner Schumacher gone to law school in Mexico and never practiced law even a single day, she would now be eligible to take the Pennsylvania bar examination after completing 24 credit hours. That she chose to go to school in a non-ABA accredited California school, has passed the California Bar Examination, and has practiced law for many years in California certainly should entitle her to better and not worse treatment than had she attended school abroad.

2. This Court should review the Court of Appeals decision because that decision raises important questions as to whether the Fourteenth Amendment's equal protection clause limits a state's power to withhold certain benefits from residents of sister states to obtain totally unrelated advantages for its

residents. The Court's holding that a state has a legitimate interest in achieving "reciprocal" treatment even when it does not seek mutuality, but rather seeks to obtain a greater benefit for a different class of people than it provides the sister state, has disturbing and wide-ranging implications. The Court's logic could permit states to engage in a variety of coercive measures holding individual out-of-state residents hostage to achieve unrelated advantages for its residents. Moreover, the Court of Appeals decision conflicts with this Court's equal protection analysis in *Nordlinger v. Hahn*, 60 U.S.L.W. 4563, 4567 (1992) requiring that a state's interest must reasonably have been the purpose and policy of the relevant governmental decisionmaker.

The Court of Appeals, recognizing that neither competency nor strict mutuality of

treatment was furthered by Rule 203(a)(2)(ii), articulated another state interest that it claimed was rationally furthered by the rule. The Court recognized that Pennsylvania's bar of out-of-state attorneys who graduated from non-ABA accredited schools and practiced law in a non-reciprocal state did not aid its similarly situated attorneys who graduated from non-ABA accredited schools. (App. A, a22-a24) The Court found however, that Pennsylvania, by preventing plaintiffs from taking the Pennsylvania Bar Examination, might entice states such as California to become "Reciprocal" and thus aid a different class of Pennsylvania attorneys (experienced lawyers who graduated from ABA accredited schools), who sought to waive into the bar of California without taking any examination. (App. A, a25) Pennsylvania Rule

203(a)(2)(ii) tells California that, if it wants its graduates of non-ABA accredited law schools to be able to take the Pennsylvania Bar Examination, California must not only allow similarly situated Pennsylvania attorneys to take its examination, (which California already does), but in addition must allow another group of Pennsylvania attorneys to waive into the California bar without taking any examination whatsoever. To obtain certain advantages for its group X, California must bestow on Pennsylvania's group Y greater advantages than it seeks to obtain for its group X. This rationale articulated by the Court of Appeals perverts the ordinary meaning of reciprocity as obtaining mutual or similar treatment and is an illegitimate state interest at odds with the basic functioning of our Federal Union.

(a) The difference between reciprocity and pure retaliation or coercion lies in the concept of mutuality. Once reciprocal arrangements are cast adrift from securing mutual treatment for similarly situated citizens of both states, they lose whatever economic and constitutional justification they may have and instead become the means for one state to coerce another into giving favorable treatment to its citizens.

The implications of the Court of Appeals rationale are far-reaching. Under the decision, Pennsylvania could retaliate against California's requirement that all lawyers must take an examination by refusing to permit California doctors to practice in Pennsylvania without examination, even if California already permits Pennsylvania doctors to practice without examination in California, and

even if Pennsylvania believes that Californian doctors are competent to practice in Pennsylvania without an examination. Pennsylvania could also refuse to admit petitioners to the practice of law unless California agrees to accept Pennsylvania's garbage, provide certain Pennsylvania residents doing business in California tax breaks, or enact some other unrelated provision that Pennsylvania wants.

The state's interest in reciprocity must require, at minimum, some notion of parallelism or mutuality. To harm one group of citizens from a sister state in order to help a totally unrelated group of one's own citizens is illegitimate. It adds a condition to an attorney's admission to the Pennsylvania bar that not only is unrelated to the state's interest in ensuring a competent bar, but is not

even rationally related to the classification the state has created. The only relevance of the additional condition for admission is its effect on an unrelated group, outside of the classification.

(b) The Court's own opinion illustrates the illegitimacy of its asserted interest. In response to the plaintiffs' argument that Pennsylvania cannot "hold out-of-state non-ABA law school graduates hostage in order to achieve favorable treatment for its experienced lawyers who graduated from ABA approved schools," the Court answered with a nonsequitor, stating that there was "no evidence that Pennsylvania intended to 'harm' its attorneys who are graduates of unaccredited law schools to advance the interests of its attorneys who are graduates of accredited law schools."

(App. A, a26) If, as the Court suggests, it is illegitimate for Pennsylvania to harm its own unaccredited law graduates to aid the interests of its ABA accredited law school graduates, it ought to be *a fortiori* illegitimate for Pennsylvania to harm out-of-state non-ABA graduates to advance those same interests. At least the in-state non-ABA graduates constitute part of the electorate of Pennsylvania who have some voice in that state's body politic. The Court of Appeals, by treating the hypothetical claims of in-state lawyers more favorably than the claims of out-of-state lawyers in petitioners' situation, demonstrates the illegitimacy of an reciprocity arrangement that is not based on mutuality.

(c) Last term, this Court required that a state's purpose, while it need not actually be articulated, must "reasonably

have been the purpose and policy" of the relevant governmental decisionmaker. *Nordlinger v. Hahn*, 60 U.S.L.W. 4563, 4567 (1992) quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-529 (1959). In this case the Magistrate held that "there was absolutely no evidence that would support" finding that the true purpose of Rule 203(a)(2)(ii) was the purpose articulated by the Court of Appeals. Moreover, the defendants *never* argued in any of the courts below that the purpose of the Rule was that found to be the only rational purpose by the Court of Appeals. It is hard to see on this record how the purpose set forth by the Court of Appeals may reasonably have been the purpose and policy of the Pennsylvania Supreme Court when it adopted this rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1992

Appendix A

Filed June 3, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3666

DANA SCHUMACHER, LEROY HODGE,
Appellants

v.

ROBERT N.C. NIX, JR.,
CHIEF JUSTICE OF THE SUPREME COURT OF
PENNSYLVANIA; ROLF LARSEN,
JUSTICE OF THE SUPREME COURT OF
PENNSYLVANIA; JOHN P. FLAHERTY,
JUSTICE OF THE SUPREME COURT OF
PENNSYLVANIA; JAMES T. McDERMOTT,
JUSTICE OF THE SUPREME COURT OF
PENNSYLVANIA; STEPHEN A. ZAPPALA,
JUSTICE OF THE SUPREME COURT OF
PENNSYLVANIA; NICHOLAS P. PAPADAKOS,
JUSTICE OF THE SUPREME COURT OF
PENNSYLVANIA; RALPH J. CAPPY,
JUSTICE OF THE SUPREME COURT OF
PENNSYLVANIA; PATRICK TASSOS,
EXECUTIVE DIRECTOR OF THE PENNSYLVANIA
BOARD OF LAW EXAMINERS

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 90-1431)

Argued April 6, 1992

Before: GREENBERG and SCIRICA,
Circuit Judges, and
DEBEVOISE, *District Judge**

(Filed June 3, 1992)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

This case presents an equal protection challenge to Pennsylvania Bar Admission Rule 203(a)(2)(ii), which governs the eligibility of graduates of unaccredited law schools to sit for the Pennsylvania bar examination. The district court entered summary judgment for defendants on the ground that the Rule is rationally related to Pennsylvania's interest in securing mutual

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*The Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

treatment for its attorneys seeking admission to the bars of other states. We will affirm.

I

Plaintiffs Dana Schumacher and Leroy Hodge are graduates of the People's College of Law in California, which is not accredited by the American Bar Association. They have taken and passed the California first-year law students' examination, professional responsibility examination, and general bar examination. Plaintiffs are members in good standing of the California bar, and have practiced law in that state for more than five years.

Plaintiffs moved to Pennsylvania in 1987. Since then they have been admitted to the bars of the United States District Court for the Western District of Pennsylvania, the United States Court of Appeals for the Third Circuit, and the United States Supreme Court. Plaintiffs have been unable to gain admission to the Pennsylvania bar, however, because they are ineligible to sit for the Pennsylvania bar examination.[1]

As a general matter, only graduates of law schools accredited by the ABA are eligible to sit for the Pennsylvania bar examination. Pa. B.A.R.

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1. Schumacher applied to the Pennsylvania Board of Law Examiners for permission to sit for the bar examination, but her application was denied pursuant to Rule 203(a)(2)(ii); Hodge has not applied for permission to sit for the Pennsylvania bar examination, because he believes it would be futile. Because Schumacher has standing to maintain this action, and Schumacher and Hodge present identical challenges to Rule 203(a)(2)(ii), we need not consider whether Hodge would have standing to bring this action individually. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

203(a)(2)(i). There is an exception, however, for graduates of unaccredited law schools who are members in good standing of the bar of a "reciprocal state" and have practiced law there for five years. *Id.* 203(a)(2)(ii).[2] "Reciprocal state" is defined as "[a] state having a reciprocal agreement or arrangement with [Pennsylvania] concerning

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2. Rule 203. Admission of graduates of accredited and unaccredited institutions.

> (a) *Bar Examination.* The general requirements for permission to sit for the bar examination are:
>
> (1) Receipt of an undergraduate degree from an accredited college or university . . . .
>
> (2)(i) Except as provided in subparagraph 2(ii) of the Rule, completion of the study of law at and receipt without exception of an earned Bachelor of Laws or Juris Doctor degree from an *accredited* law school. . . . ; or
>
> (2)(ii) Completion of the study of law at and receipt without exception of an earned Bachelor of Laws or Juris Doctors degree from an *unaccredited* law school located within the boundaries of the United States of America, provided that the applicant is a member of the bar of a *reciprocal state* and meets the following qualifications:
>
> (A) Presentation of a certificate from the highest court or agency of such state having jurisdiction over admission to the bar and the practice of law stating that the applicant is in good standing at the bar of such court or such state.
>
> (B) Presentation of proof satisfactory to the Board that the applicant, while continuously engaged in the practice of law in any state or states outside of this Commonwealth and subsequent to admission in a reciprocal state, has for a period of five years:
>
> (i) practiced law in a reciprocal state or states outside this Commonwealth. . . .

Pa. B.A.R. 203 (emphasis added).

admission to the bar." *Id.* 102(a). In practice, the Pennsylvania Board of Law Examiners has accorded reciprocal status to those states which permit experienced Pennsylvania attorneys who are graduates of accredited law schools to waive into their bar without taking an examination.[3]

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3. Stephen Bosch, a former secretary and treasurer of the Pennsylvania Board of Law Examiners, attested that, although Rule 102(a) calls for a "reciprocal agreement or arrangement," to obtain reciprocal status a state need only announce that it "wishes to be reciprocal as we commonly understand reciprocity."

Bosch explained the significance of the grant of reciprocal status as follows:

> In its basic terms it meant that attorneys from the new reciprocal state and attorneys from Pennsylvania could apply to be admitted in each other [sic] states without having to take and pass the multistate bar examination. And, of course, *it meant for Pennsylvania that they could seek to be admitted in other states without have [sic] to sit for a bar examination*, and we in turn would then take in attorneys from the new reciprocal state and give them a license to practice law in Pennsylvania without having to take a bar examination and, of course, without having to be a resident of Pennsylvania.

(emphasis added). This view comports with that held by Bosch's predecessor, Susan L. Anderson, who in a memorandum to the Board of Law Examiners listed as reciprocal states those states which "require the attorney applicant to sit for an examination, either the bar examination or an attorney examination."

It is not clear from either Bosch's deposition testimony or Anderson's memorandum whether they were referring to Pennsylvania attorneys who are graduates of accredited law schools, unaccredited law schools, or both. However, as plaintiffs point out, the only consistent difference between how reciprocal and nonreciprocal states treat Pennsylvania

California is not considered a reciprocal state by the Board of Law Examiners, because it will not allow Pennsylvania attorneys, whether graduates of accredited law schools or not, to become members of its bar without taking an examination. Accordingly, although plaintiffs are members in good standing of the California bar and have practiced law there for five years, they are ineligible to sit for the Pennsylvania bar examination. To become eligible, plaintiffs would have to either obtain a degree from an accredited law school or become members in good standing of the bar of a reciprocal state and practice law there for five years. *See id.* 203(a)(2)(ii).

On August 29, 1990, plaintiffs filed this 42 U.S.C. § 1983 action in federal district court seeking a declaration that Rule 203(a)(2)(ii) is unconstitutional and an injunction preventing its enforcement. Defendants are the Chief Justice and Justices of the Pennsylvania Supreme Court, who promulgated Rule 203(a)(2)(ii), *see* 42 Pa. Cons. Stat. Ann. §§ 1701 & 1722(a)(1), and the Executive Director of the Pennsylvania Board of Law Examiners, who is responsible for implementing the Rule, *see* Pa. B.A.R. 104(c).

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attorneys is that reciprocal states allow experienced Pennsylvania attorneys who are graduates of accredited law schools to waive into their bar without taking an examination. Accordingly, we understand Bosch's and Anderson's references to be to Pennsylvania attorneys who are graduates of accredited law schools.

Defendants call into question Bosch's deposition testimony, because, as Bosch himself admitted, he left the Board of Law Examiners on "nonamicable" terms. However, defendants have not pointed to any evidence that conflicts with Bosch's testimony. Therefore, it is unrebutted.

In their complaint, plaintiffs allege that Rule 203(a)(2)(ii) violates the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 2.[4] They assert that the Rule substantially interferes with their fundamental right to interstate travel by discouraging them from moving to Pennsylvania, and is invalid under the strict scrutiny standard of equal protection analysis.[5] In

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4. The complaint also alleges that Rule 203(a)(2)(ii) violates the Privileges and Immunities Clause of Article IV, U.S. Const. art. IV, § 2, and the Due Process Clause of the Fourteenth Amendment, *id.* amend. XIV, § 2, of the Constitution. However, plaintiffs' privileges and immunities claim lacks merit, because plaintiffs are required to meet the same requirements for admission to the Pennsylvania bar under the Rule as Pennsylvania graduates of unaccredited law schools. *See Lutz v. City of York*, 899 F.2d 255, 262 (3d Cir. 1990) ("[T]he purpose of the [Privileges and Immunities] [C]lause was simply 'to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.'") (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)). And because plaintiffs' substantive due process claim is amenable to an equal protection analysis, *see Jones v. Helms*, 452 U.S. 412 (1981); Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537, 558-59 n.69 (1982), plaintiffs have not pursued it separately.

5. On appeal, plaintiffs suggest that even if the strict scrutiny standard is not controlling, we should subject Rule 203(a)(2)(ii) to "heightened scrutiny." They cite *Lutz v. City of York*, 899 F.2d at 257, where we applied intermediate scrutiny to a municipal "cruising" ordinance prohibiting "unnecessary repetitive driving" in certain areas between the hours of 7:00 p.m. and 3:30 a.m. Significantly, the challenge in that case was predicated on the right to *intra*state travel, which we said emanated from the substantive component of the Fourteenth Amendment Due Process Clause. *Id.* at 268. By contrast, plaintiffs' challenge here is predicated on the right to *inter*state travel. As we discuss below, in reviewing challenges predicated

the alternative, they contend that the Rule cannot pass the minimum rational basis test, because there is no logical connection between whether a state is considered reciprocal by the Pennsylvania Board of Law Examiners and whether it accords mutual treatment to Pennsylvania attorneys who are graduates of unaccredited law schools.

After both parties sought summary judgment, a magistrate judge recommended that summary judgment be granted for defendants. Rejecting plaintiffs' argument that strict scrutiny applied, he held that Rule 203(a)(2)(ii) passed muster under rational basis review. The district court issued a memorandum and order adopting the magistrate judge's recommendation. *Schumacher v. Nix*, No. 90-1431 (W.D. Pa. Aug. 27, 1991). This appeal followed.

II

We have jurisdiction under 28 U.S.C. § 1291.[6] At issue is whether Rule 203(a)(2)(ii) violates

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on the right to interstate travel, the Supreme Court has applied either strict scrutiny or rational basis review. Accordingly, we reject plaintiffs' suggestion that intermediate scrutiny would be proper here.

6. The *Rooker-Feldman* doctrine presents no jurisdictional obstacle here. Under that doctrine, "federal district courts lack subject matter jurisdiction to review final adjudications of a state's highest court or to evaluate constitutional claims that are 'inextricably intertwined with the state court's [decision] in a judicial proceeding.'" *Blake v. Papadakos*, 953 F.2d 68, 71 (3d Cir. 1992) (quoting *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923)). Although Schumacher applied for and was denied permission to sit for the Pennsylvania bar examination, the complaint before us presents a general

plaintiffs' right to equal protection of the laws. Our review of the district court's grant of summary judgment for defendants is plenary. *Sacred Heart Medical Ctr. v. Sullivan*, 958 F.2d 537, 543 (3d Cir. 1992). We apply the same principles governing the district court's determination whether to grant summary judgment, and must be convinced that defendants have successfully demonstrated "that there is no genuine issue as to any material fact and that [they are] . . . entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

A

The threshold question is what standard of equal protection analysis governs our review of Rule 203(a)(2)(ii). As a general matter, economic and social legislation[7] is subject to rational basis review, under which a law need only be "rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per

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constitutional challenge to Rule 203(a)(2)(ii). As such, we do not believe this action is so "inextricably intertwined" with the denial of Schumacher's application that it divests us of subject matter jurisdiction under *Rooker-Feldman*. *Cf. Lowrie v. Goldenhersh*, 716 F.2d 401, 404-08 (7th Cir. 1983).

7. We are not reviewing legislation in the traditional sense. Rule 203(a)(2)(ii) was promulgated by the justices of the Pennsylvania Supreme Court pursuant to the authority delegated to them by the Pennsylvania General Assembly. *See* 42 Pa. Cons. Stat. Ann. §§ 1701 & 1722(a)(1). However, the fact that the Rule was not enacted by a legislative body does not affect our equal protection inquiry. *See Delaware River Basin Comm'n v. Bucks County*, 641 F.2d 1087, 1093 n.11 (3d Cir. 1981). *See also* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 353 (1949).

curiam). However, where such legislation establishes "a classification [that] trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage," *id.*, it must meet the strict scrutiny standard, under which a law must be narrowly tailored to further a compelling government interest. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

As we have noted, plaintiffs argue that we must subject Rule 203(a)(2)(ii) to strict scrutiny, because it substantially burdens their right to travel by deterring them from migrating to Pennsylvania. The district court disagreed, and applied rational basis review instead. It found the right to travel cases cited by plaintiffs inapposite, because Rule 203(a)(2)(ii) does not "condition the receipt of a benefit on a form of in-state residency." And even though the Rule has the "practical effect" of making plaintiffs ineligible to practice law in Pennsylvania, the district court concluded that it does not so impinge plaintiffs' "freedom of movement" as to trigger strict scrutiny. We agree.

"[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *United States v. Guest*, 383 U.S. 745, 758 (1966). Although the Supreme Court has declined to "ascribe the source of this right . . . to a particular constitutional provision," *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969), it has been said that the right to interstate travel finds its "most forceful expression in the context of equal protection analysis," *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J., concurring). *Cf. Lutz v. City of York*, 899 F.2d 255, 258-68 (3d

Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986), a plurality of the Court applied strict scrutiny to a civil service preference for Vietnam veterans with residency at the time they entered military service, but the fifth and sixth votes for striking down the preference were cast by Justices applying rational basis review.

The Supreme Court has yet to articulate why it has applied rational basis review in some right to travel cases and strict scrutiny in others, except to say that where a law cannot meet the minimum rationality requirement there is no need to undertake a more searching inquiry. *See Zobel*, 457 U.S. at 60-61; *Soto-Lopez*, 476 U.S. at 912 (Burger, C.J., concurring). Plaintiffs maintain that the proper level of equal protection analysis is dependent on the degree to which the right to travel is infringed, and, because Rule 203(a)(2)(ii) substantially burdens their right to travel, we must subject it to strict scrutiny. Although the extent to which the right to travel is impinged may affect the standard of equal protection review, we cannot agree that the strict scrutiny standard applies here.

As the preceding discussion illustrates, the *Shapiro* line of cases has, without exception, involved challenges to state laws that create "distinctions between newcomers and longer term residents." *Zobel*, 457 U.S. at 60 n.6. As the district court observed, however, Rule 203(a)(2)(ii) neither conditions the receipt of in-state benefits on residency nor classifies applicants on the basis of residency. Under the Rule, Pennsylvania graduates of unaccredited law schools must meet the same requirements to sit for the Pennsylvania

Cir. 1990) (concluding that the right to *intra*state travel emanates from the substantive component of the Fourteenth Amendment Due Process Clause).

The Supreme Court's modern right to travel jurisprudence originated in *Shapiro v. Thompson*. There the Supreme Court struck down under strict scrutiny a durational residency requirement for welfare benefits. Following *Shapiro*, the Court applied strict scrutiny in striking down durational residency requirements to vote, *Dunn v. Blumstein*, 405 U.S. 330 (1972); and to receive free nonemergency medical care, *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 258 (1974). *But cf. Sosna v. Iowa*, 419 U.S. 393 (1975) (upholding durational residency requirement for in-state divorce).[8]

In *Zobel v. Williams*, however, the Court employed rational basis review in striking down a legislative scheme for distribution of surplus oil revenues to citizens based on duration of residency. Three years later, in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), the Court applied rational basis review in striking down a limited property tax exemption for Vietnam veterans with residency prior to May 8, 1976. In

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8. The *Sosna* Court applied a less searching equal protection review. The Court said that the durational residency requirement was constitutional, because it could "reasonably be justified" by the circumstances attendant to divorce and "furthers the State's parallel interests in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack." 419 U.S. at 406-407. This analysis seems closer to rational basis review than strict scrutiny.

bar examination as nonresident graduates of unaccredited law schools.

This is not to say that Rule 203(a)(2)(ii) is no impediment to plaintiffs' freedom of movement. Surely, the Rule has some deterrent effect on nonresident attorneys who wish to migrate to Pennsylvania but choose not to because they are ineligible to sit for the Pennsylvania bar examination. However, the Constitution does not guarantee that citizens of State A may move to State B and enjoy the same privileges they did as citizens of State A, only that citizens of State A may move to State B and be treated on similar terms as the citizens of State B. *See Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (construing U.S. Const. Art. IV, § 2). Nor does it "require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another." *Leis v. Flynt*, 439 U.S. 438, 443 (1979) (per curiam).

Therefore, because Rule 203(a)(2)(ii) neither establishes a classification based on residency nor erects a barrier to migration, we believe rational basis review applies here.[9] We are not alone in this view. The courts that have considered equal

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9. Plaintiffs have not alleged that any other fundamental right is impinged by Rule 203(a)(2)(ii). We note, however, that "the right to practice law is not a fundamental right for purposes of . . . equal protection analysis." *Edelstein v. Wilentz*, 812 F.2d 128, 132 (3d Cir. 1987). *Cf. Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985) (suggesting that the opportunity to practice law is fundamental for purposes of a Privileges and Immunities Clause analysis). Nor have plaintiffs alleged that they are members of a suspect class or that the Rule was enacted purposefully to discourage migration.

protection challenges to state bar rules have uniformly applied rational basis review. *See, e.g., Nordgren v. Hafter*, 789 F.2d 334 (5th Cir.), *cert. denied*, 479 U.S. 850 (1986); *Lupert v. California State Bar*, 761 F.2d 1325 (9th Cir.), *cert. denied and appeal dismissed*, 474 U.S. 916 (1985); *Salibra v. Supreme Court of Ohio*, 730 F.2d 1059 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984); *Lowrie v. Goldenhersh*, 716 F.2d 401 (7th Cir. 1983). And at least two courts have embraced the right to travel analysis we adopt here.

In *Moore v. Supreme Court of South Carolina*, 447 F. Supp. 527 (D.S.C. 1977), *aff'd without op.*, 577 F.2d 735 (4th Cir.), *cert. denied*, 439 U.S. 984 (1978), the district court dismissed a right to travel challenge to a South Carolina bar rule that made *all* graduates of unaccredited law schools ineligible to practice law in that state. The plaintiff in *Moore* asserted that the rule impinged his right to travel by not allowing him "to pursue his chosen vocation" in South Carolina, thus triggering strict scrutiny. *Id.* at 530. The district court disagreed.

It noted the "crucial factual distinction" between laws that create classifications based on residency, like those challenged in the "*Shapiro* line of cases," and laws that create classifications unrelated to residency. Because the challenged rule distinguished only "between those who have graduated from ABA approved law schools and those who have not," the district court found the Supreme Court's right to travel cases "inapplicable." Therefore, although the rule "clearly discourage[d] plaintiff from traveling to South Carolina for the purpose of establishing a residence," the court held that rational basis review applied. *Id.*

The *Moore* court relied in part on *Hawkins v. Moss*, 503 F.2d 1171 (4th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975). There the court of appeals rejected a right to travel challenge to a South Carolina bar rule that exempted from the general examination requirement experienced attorneys from reciprocal states but not similarly situated attorneys from nonreciprocal states. The court stated:

> [T]he "right to travel" . . . is not to be construed to mean that a citizen carries with him from state to state an absolute right of comity to practice, not a "common occupation," but a profession, which is properly subject to state regulation, in any state to which he travels . . . . The exercise by a state of power to regulate *reasonably* the practice of law within its jurisdiction and to require of any applicant, whether a resident or a migrant, that he demonstrate sufficient proficiency in the law as a prerequisite to a license to practice, is, as we have seen perfectly permissible and represents no violation . . . of the Fourteenth Amendment.

Id. at 1178-79 (emphasis added). *Cf. Shenfield v. Prather*, 387 F. Supp. 676, 683-86 (N.D. Miss. 1974) (undertaking right to travel analysis of state bar rule requiring attorneys from nonreciprocal states to sit for bar examination but concluding that rational basis review applied).

Finally, our conclusion that rational basis review applies here squares with the deference the Supreme Court has long afforded states in regulating the practice of law and admission to the bar. *See Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) ("A State can require high

standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a *rational* connection with the applicant's fitness or capacity to practice law.") (emphasis added). *See also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 484 n.16 (1983); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434-35 (1982).

B

Having concluded that rational basis review governs our equal protection analysis of Rule 203(a)(2)(ii), the next question is whether the Rule passes muster under this standard. The district court determined that Rule 203(a)(2)(ii) is rationally related to Pennsylvania's interest in securing mutual treatment for its attorneys seeking admission to the bars of other states. Plaintiffs argue that the Rule cannot further Pennsylvania's reciprocity interest, because the Pennsylvania Board of Law Examiners has not conditioned the grant of reciprocal status on whether a state accords mutual treatment to Pennsylvania attorneys who are graduates of unaccredited law schools.

State laws that neither employ a suspect classification nor impinge a fundamental right are "entitled to a presumption of validity against attack under the Equal Protection Clause." *Parham v. Hughes*, 441 U.S. 347, 351 (1979). *Cf. City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. at 440 ("[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."). This presumption finds its expression in the rational basis test.

which requires only that a law "classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

Rational basis review accords great deference "to legislative determinations as to the desirability of particular statutory discriminations." *City of New Orleans v. Dukes*, 427 U.S. at 303. Under this standard, the Supreme Court has said that "a statutory distinction does not violate the Equal Protection Clause 'if any state of facts reasonably may be conceived to justify it,'" *Sullivan v. Stroop*, 110 S. Ct. 2499, 2504 (1990) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987)), and that "rational distinctions may be made with substantially less than mathematical exactitude," *City of New Orleans*, 427 U.S. at 303.

Of course, rational basis review is not "entirely 'toothless.'" *Murillo v. Bambrick*, 681 F.2d 898, 905 n.15 (3d Cir.), *cert. denied*, 459 U.S. 1017 (1982). "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Laws that cannot meet this minimum rationality requirement are constitutionally infirm. *See, e.g., Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Delaware River Basin Comm'n v. Bucks County*, 641 F.2d 1087 (3d Cir. 1981).

To determine whether Rule 203(a)(2)(ii) passes rational basis review, we must first "identify with particularity the precise classification alleged to be irrational." *Murillo*, 681 F.2d at 906. The

challenged classification here is between similarly situated attorneys in reciprocal and nonreciprocal states who have graduated from unaccredited law schools, are members in good standing of the bar, and have practiced law for five years. Under Rule 203(a)(2)(ii), only experienced attorneys who are graduates of unaccredited law schools from reciprocal states are eligible to sit for the Pennsylvania bar examination.

As we have noted, although plaintiffs are members in good standing of the California bar and have practiced law there for five years, they are ineligible to sit for the Pennsylvania bar examination because California is not considered a reciprocal state by the Pennsylvania Board of Law Examiners. Of course, as defendants point out, plaintiffs would be eligible to sit for the Pennsylvania bar examination if they had graduated from an accredited law school. *See* Pa. B.A.R. 203(a)(2)(i). But this is not relevant to our equal protection inquiry. Having decided to allow some graduates of unaccredited law schools to sit for its bar examination (*i.e.*, those who are experienced attorneys from reciprocal states), Pennsylvania cannot deny this privilege to similarly situated graduates of unaccredited law schools (*i.e.*, those who are experienced attorneys from nonreciprocal states) without meeting the minimum rationality requirement. *See Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152, 1157-58 (3d Cir. 1981).[10]

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10. Although we need not decide the issue, it would seem settled that Pennsylvania could require all candidates for admission to the bar to have graduated from an accredited

We must decide whether Pennsylvania has a legitimate interest in classifying experienced attorneys who are graduates of unaccredited law schools on the basis of whether they are members of the bar of a reciprocal state, and, if so, whether Rule 203(a)(2)(ii) is rationally related to this interest. It is undisputed that the Rule rests upon a legitimate state interest. As the district court observed, the Rule is intended to "secure[] for Pennsylvania attorneys who decide to relocate, the advantage of favorable terms of admission to another state's bar by offering that same advantage to attorneys of such other states that will reciprocate." And it is established that such reciprocity provisions are a valid exercise of state power, because they help ease the burdens of relocation for resident attorneys seeking admission to the bars of other states. *See Hawkins v. Moss*, 503 F.2d at 1176-77; *Goldsmith v. Pringle*, 399 F. Supp. 620, 623 (D. Colo. 1975).[11]

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law school. *See Potter v. New Jersey Supreme Court*, 403 F. Supp. 1036, 1037-38 (D.N.J. 1975), *aff'd without op.*, 546 F.2d 418 (3d Cir. 1976).

11. Defendants argue that Rule 203(a)(2)(ii) also promotes Pennsylvania's interest in ensuring a competent bar. Although this too is a valid state objective, *see Lowrie v. Goldenhersh*, 716 F.2d at 409, we cannot say that Rule 203(a)(2)(ii) furthers it. The Rule evinces an administrative judgment that graduates of unaccredited law schools who are members in good standing of the bar of another state and have practiced law there for five years are competent to practice law if they pass the Pennsylvania bar examination. We can discern no reason why, as a general matter, experienced graduates of unaccredited law schools from reciprocal states would be more competent to practice law than experienced graduates of unaccredited law schools from nonreciprocal states.

The pivotal question here is whether Rule 203(a)(2)(ii) reasonably furthers Pennsylvania's interest in securing mutual treatment for its attorneys seeking admission to the bars of other states. As we have noted, plaintiffs assert that the Rule is not rationally related to this objective, because there is no logical connection between whether a state is considered reciprocal by the Pennsylvania Board of Law Examiners and whether that state accords mutual treatment to Pennsylvania attorneys who are graduates of unaccredited law schools. Neither the district court nor defendants squarely addressed this argument.

Moreover, the cases rejecting equal protection challenges to reciprocity provisions similar to Rule 203(a)(2)(ii) provide no assistance on this point. *See, e.g., Hawkins v. Moss*, 503 F.2d 1171 (rejecting challenge to state bar rule exempting

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Citing *Appeal of Murphy*, 393 A.2d 369 (Pa. 1978), *cert. denied and appeal dismissed sub nom. Murphy v. Pennsylvania State Board of Bar Examiners*, 440 U.S. 901 (1979), defendants maintain that graduates of unaccredited law schools in certain states— namely, California—are less qualified than graduates of unaccredited law schools in other states, because of the manner in which these states regulate (or, rather, fail to regulate) their unaccredited law schools. However, Rule 203(a)(2)(ii) does not distinguish between graduates of unaccredited law schools in states that closely regulate their unaccredited law schools and graduates of unaccredited law schools in states that do not. Nor is there any evidence that the Pennsylvania Board of Law Examiners has attempted to do so in determining which states should be accorded reciprocal status. Therefore, even if it can be said that graduates of unaccredited law schools in certain states are less qualified than graduates of unaccredited law schools in other states, the Rule would not prevent these graduates from becoming members of the Pennsylvania bar.

from general bar examination requirement experienced attorneys from reciprocal states); *Shenfield v. Prather*, 387 F. Supp. 676 (same). The focus in those cases was on whether the reciprocity provisions were enacted pursuant to a legitimate state interest, not whether they were rationally related to that interest. Therefore, the courts had no occasion to consider the type of challenge presented here.

On its face, Rule 203(a)(2)(ii) would seem to further Pennsylvania's reciprocity interest. It distinguishes between similarly situated graduates of unaccredited law schools from reciprocal and nonreciprocal states, and "reciprocal state" is defined as "[a] state having a reciprocal agreement or arrangement with [Pennsylvania] concerning admission to the bar." Pa. B.A.R. 102(a). Accordingly, under the conventional notion of "reciprocity" at least,[12] it would seem clear that Pennsylvania could reasonably have conceived that the Rule would promote its interest in securing mutual treatment for its attorneys seeking admission to the bars of other states.

But this does not end the inquiry, for a classification which is constitutional on its face may be unconstitutional as applied. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). And even under rational basis review, "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by

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12. *Webster's Third New International Dictionary* 1895 (1964) defines "reciprocity" as "a mutual exchange of courtesies between two states or institutions; *specif* : a recognition by each state or institution of the validity of licenses or privileges granted by the other to its citizens or members."

showing to the court that those facts have ceased to exist." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938), though such challenges cannot succeed where it is "at least debatable" that the classification is rational, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). *See also* Tussman & tenBroek, *supra* note 6, at 367-68.

Here it is the implementation of Rule 203(a)(2)(ii) by the Pennsylvania Board of Law Examiners which has given rise to plaintiffs' equal protection challenge. As plaintiffs point out, it is difficult to glean any nexus between whether a state has reciprocity with Pennsylvania and whether it accords mutual treatment to Pennsylvania attorneys who are graduates of unaccredited law schools. Of the twenty-six jurisdictions that had reciprocity with Pennsylvania in July 1987,[13] twelve *would not* allow Pennsylvania attorneys who are graduates of unaccredited law schools to become members of their bar;[14] and of the jurisdictions that did not have reciprocity at that time, ten *would* permit Pennsylvania attorneys who

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13. These jurisdictions were Alaska, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

14. These states are Illinois, Rules 703 and 705; Kentucky, Rules 2.070 and 2.110; Michigan, Rules 2(B) and 5(A); Minnesota, Rule II; Montana, Section I(1); New York, Rule 520.2-.4; North Carolina, Section .0702; North Dakota, Rule 1; Ohio, Rule 1, Section 1(c); Oklahoma, Rule 2(2); Tennessee, Rule 2.02; and Wyoming, Rule 5(e).

are graduates of unaccredited law schools to become members of their bar.[15]

As plaintiffs point out, the only uniform difference between how reciprocal and nonreciprocal states treat Pennsylvania attorneys is that reciprocal states allow experienced Pennsylvania attorneys who are graduates of accredited law schools to waive into their bar without taking an examination. Therefore, it would seem that the Board of Law Examiners has conditioned the grant of reciprocal status on whether a state accords mutual treatment to Pennsylvania attorneys who are graduates of accredited law schools without regard to whether that state accords mutual treatment to Pennsylvania attorneys who are graduates of unaccredited law schools.[16] As such, plaintiffs

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15. These states are Arizona, Rule 34(c)(1)(D); California, Rule IV; Florida, Article III(c); Hawaii, Rule 1(c); Maine, Rule 10(c)(3); Maryland, Rule 13(a); New Mexico, Rule 15-103(B)(2); Oregon, Rules 2.25 and 2.30; Utah, Rule 4; and Washington, Rule 3(b)(2).

16. It is not clear from the record whether there are in fact Pennsylvania attorneys who are graduates of unaccredited law schools. As we have noted, Rule 203(a)(2)(ii) is the exception to Pennsylvania's general policy that graduates of unaccredited law schools are ineligible to sit for the Pennsylvania bar examination. Accordingly, it would seem that the only way in which a graduate of an unaccredited law school may become a member of the Pennsylvania bar is by becoming a member in good standing of the bar of a reciprocal state, practicing law there for five years, and passing the Pennsylvania bar examination and other character and fitness requirements. The record does not indicate how many graduates of unaccredited law schools have become members of the Pennsylvania bar through this process. Although we assume there are some, we note that, if there were no Pennsylvania attorneys who are

argue that Rule 203(a)(2)(ii) cannot further the state's interest in securing mutual treatment for its attorneys who are graduates of unaccredited law schools.

Given the lack of nexus between whether a state is considered reciprocal by the Board of Law Examiners and whether it accords similar treatment to Pennsylvania attorneys who are graduates of unaccredited law schools, we agree that it is difficult to see how Pennsylvania's reciprocity interest is furthered as to these attorneys.[17] However, this does not decide the constitutionality of Rule 203(a)(2)(ii), because plaintiffs have framed Pennsylvania's reciprocity interest too narrowly. Pennsylvania has a legitimate interest in securing mutual treatment for *all* its attorneys seeking admission to the bars of other states, whether they are graduates of

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graduates of unaccredited law schools, it would of course be reasonable for the Board of Law Examiners not to condition the grant of reciprocal status on whether states seeking reciprocity accord mutual treatment to such attorneys.

17. We note, however, that although Rule 203(a)(2)(ii) may not directly further Pennsylvania's reciprocity interest as to its attorneys who are graduates of unaccredited law schools, it does not undermine it either. The fact is that many reciprocal states would allow Pennsylvania attorneys who are graduates of unaccredited law schools to sit for their bar examination. It is possible, therefore, that the Rule indirectly furthers Pennsylvania's reciprocity interest as to its attorneys who are graduates of unaccredited law schools by setting an example for other jurisdictions to follow. In any event, because we believe, for the reasons we express below, that Rule 203(a)(2)(ii) promotes Pennsylvania's reciprocity interest as to its attorneys who are graduates of accredited law schools, we need not decide whether this indirect effect, standing alone, would satisfy the minimum rationality requirement.

accredited or unaccredited law schools. Therefore, even if Rule 203(a)(2)(ii) does not promote Pennsylvania's reciprocity interest as to its attorneys who are graduates of unaccredited law schools, we think the Rule would pass rational basis review if it furthered the state's reciprocity interest as to its attorneys who are graduates of accredited law schools.

Viewed in this light, we believe Rule 203(a)(2)(ii) is rationally related to Pennsylvania's reciprocity interest. By allowing attorneys who are graduates of unaccredited law schools from reciprocal states to sit for its bar examination, Pennsylvania may entice states to enter into reciprocal agreements with it and thereby promote its interest in securing similar treatment for its attorneys who are graduates of accredited law schools. We think it sufficient, for purposes of rationality review, that Rule 203(a)(2)(ii) furthers Pennsylvania's reciprocity interest in this respect.

Relying on dictum in *Medora v. Colautti*, 602 F.2d 1149 (3d Cir. 1979),[18] plaintiffs argue that

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18. *Medora* involved an equal protection challenge to a Pennsylvania regulation requiring all applicants for general assistance benefits for the blind, aged, or disabled to apply first for federal Supplemental Security Income (SSI) benefits. Under the regulation, applicants who were found to be blind, aged, or disabled yet ineligible for SSI benefits because they did not meet the more stringent federal "need criteria," were barred from applying for Pennsylvania general assistance benefits even if they qualified as "needy" under the state program. Because the regulation bore no rational relation to Pennsylvania's stated objective of providing "assistance to all of [the State's] needy and distressed," we struck it down under rational basis review. 602 F.2d at 1152.

In so holding, we rejected the "suggestion" that the regulation would be valid if Pennsylvania's aim in enacting it

Pennsylvania cannot "hold out-of-state non-ABA law school graduates hostage in order to achieve favorable treatment for its experienced lawyers who graduated from ABA-approved law schools." But although Rule 203(a)(2)(ii) may advance the interests of Pennsylvania attorneys who are graduates of accredited law schools and not those who are graduates of unaccredited law schools, there is no evidence that Pennsylvania intended to "harm" its attorneys who are graduates of unaccredited law schools to advance the interests of its attorneys who are graduates of accredited law schools. *Cf. United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).[19] And at least under

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was to encourage the federal government to lower its need criteria. "If such were the case," we said, Pennsylvania "would essentially be in the position of 'shooting hostages' in an attempt to bring about what it considered to be a politically desirable result." *Id.* at 1155 n.14. And "the intentional harming of a group to further some other governmental interest is not a rational means to further that other interest." *Id.*

19. *Moreno* involved an equal protection challenge to § 3(e) of the Food Stamp Act of 1964, which "exclude[d] from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household." 413 U.S. at 529. There was some suggestion in the legislative history to § 3(e) that the requirement that participating households consist of related individuals was drawn "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." *Id.* at 534 (citation omitted). The Court made clear this objective was not permissible.

> [I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a

rational basis review, it is clear that states may draw classifications "with substantially less than mathematical exactitude," *City of New Orleans*, 427 U.S. at 303, even though, in practice, such classifications result in "some inequality," *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

Accordingly, we hold that Rule 203(a)(2)(ii) meets the minimum rationality requirement. There is little question that Pennsylvania could further advance its reciprocity interest by consistently according reciprocal status on the basis of whether a state treats Pennsylvania attorneys who are graduates of unaccredited as well as accredited law schools on similar terms. However, we will not second guess the manner in which Pennsylvania has chosen to implement Rule 203(a)(2)(ii), where that Rule bears at least some reasonable relation to Pennsylvania's interest in securing mutual treatment for its attorneys seeking admission to the bars of other states. Therefore, in light of the deference we generally accord states as to economic and social matters and Pennsylvania's "especially great" interest in regulating its bar, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792

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legitimate governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to some independent considerations in the public interest, justify the 1971 amendment [to the Act]."

Id. at 534-55 (emphasis in original) (citation omitted). By contrast, here there is no evidence that Pennsylvania enacted Rule 203(a)(2)(ii) intentionally to harm its attorneys who are graduates of unaccredited law schools, and it is clear that Pennsylvania's reciprocity interest is legitimate.

(1975), we cannot say that Rule 203(a)(2)(ii) is unconstitutional.

III

For the foregoing reasons, we will affirm the district court's order granting summary judgment for defendants.

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for the Third Circuit

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DANA SCHUMACHER and LEROY HODGE,

Plaintiffs,

vs.

ROBERT N. NIX, JR., et al.,

Defendants.

MEMORANDUM AND ORDER

BARRON R. McCUNE, Senior District Judge
August 27, 1991.

We consider the objections of the plaintiffs to the report and recommendation of the United States District Court Magistrate Judge. Plaintiffs allege that Pennsylvania Bar Admission Rule 203(a)(2)(ii) denies them the opportunity to sit for the Pennsylvania Bar examination in violation of the Equal Protection, Due Process and Privileges and Immunities

Clauses of the United States Constitution. Plaintiffs seek declaratory and injunctive relief under the Civil Rights Act of 1871, 42 U.S.C. ¶ 1983. Both parties have moved for summary judgment. For reasons set forth below we accept the recommendation of the Magistrate Judge and will deny plaintiffs' motion for summary judgment and grant the motion of defendants.

FACTS

To sit for the Pennsylvania Bar examination an applicant must have graduated from a law school accredited by the American Bar Association ("ABA"). Pa. B.A.R. 203(a)(i) and 102(a). Nevertheless, an exception is carved out for certain attorneys practicing law in reciprocal states. Pennsylvania Bar Admission Rule 203(a)(2)(ii) affords a graduate of a law school not accredited by the ABA the

opportunity to sit for the Pennsylvania Bar examination provided that the applicant is a member in good standing of the bar of a reciprocal state and since admission to the bar has practiced law in a reciprocal state for 5 years.

Plaintiffs Dana Schumacher and Leroy Hodge are graduates of the Peoples College of Law located in California. The Peoples College of Law has neither sought nor obtained accreditation from the ABA. Plaintiffs have taken and passed the First-Year Law Students' Examination, the General Bar Examination and the Professional Responsibility Examination administered by the Committee of Bar Examiners of the State Bar of California. They have been admitted to the California Bar and practiced law continuously in California in excess of

five years. California is not a reciprocal state.

Both plaintiffs have moved to Pennsylvania. They have been admitted to practice before the Untied States District Court of the Western District of Pennsylvania, the United States Court of Appeals for the Third Circuit and the United States Supreme Court. Neither plaintiff is eligible to gain admission to the Pennsylvania Bar because Rule 203(a)(2)(ii) prohibits them from sitting for the Bar examination.

The objections state that the Report (1) does not adequately address whether Rule 203(a)(2)(ii) impinges on plaintiffs' interstate travel, (2) does not discuss how Rule 203(a)(2)(ii) furthers the state objective of gaining a mutual benefit for Pennsylvania's <u>similarly situated</u>

attorneys, (3) misconstrued plaintiffs' argument that Pennsylvania cannot waive the ABA approved law school requirement for attorneys from reciprocal states and not waive it for attorneys from non-reciprocal states, and (4) fails to discuss plaintiffs claim that it is irrational to treat graduates of foreign law schools more favorably than graduates of non-ABA approved schools from non-reciprocal states.

DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, the moving party is entitled to judgment as a matter of law if the movant demonstrates that there is no genuine issue of material fact.

The threshold issue is what level of scrutiny is applicable to plaintiffs' claim under equal protection analysis. The

magistrate concluded that the rational relationship applies while plaintiffs reargue that Rule 203(a)(2)(ii) penalizes plaintiffs' right to travel and thus should be subjected to strict scrutiny.

The principal modern case recognizing the right to travel as fundamental is Shapiro v. Thompson, 394 U.S. 618 (1969). In Shapiro, Pennsylvania and Connecticut denied welfare benefits to residents who had resided in a state less than one year prior to their application for benefits. The Court struck down the laws because the two classifications of needy residents (indigents with less than a year's residency and those residing in the state for a year or more) were indistinguishable from each other except for the length of their residency. This was held to be an invidious discrimination denying equal

protection of the laws. The Court's basis for applying strict scrutiny was that it "touche[d] on the fundamental right of interstate movement"--the right to travel. Id. at 638.

As set forth succinctly in Lutz v. York, 899 F.2d 255 (3d Cir. 1990), the right to travel strand of equal protection has produced some confusion in its modern use and development.

Three years after Shapiro the Court decided Dunn v. Blumstein, 405 U.S. 330 (1972). In Dunn the court struck down a durational residence requirement imposed as a condition of voting. The law infringed on the fundamental rights of voting and right to travel and thus was subject to strict scrutiny.

The Court followed the right to travel strand of the equal protection doctrine in

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974). In Memorial Hospital the Court struck down Arizona law which required a year's residence in a county as a condition to receiving non-emergency medical treatment.

Sosna v. Iowa, 419 U.S. 393 (1975) was the end of the first wave of right-to-travel cases. Sosna upheld the minimal durational residency requirement before becoming eligible to be granted an in-state divorce. Although Sosna did not impose strict scrutiny on the challenged provision, the minimal durational requirement required at least some form of heightened scrutiny.

The Court an approached the right to travel from a different perspective in Zobel v. Williams, 457 U.S. 55 (1982). The Court struck down an Alaska's scheme of

distributing surplus oil revenues to residents in proportion to the length of their residence in the state since statehood in 1959. The Court denied any close correlation between Alaska's dividend program and the duration residence criteria addressed in Shapiro, Dunn, Maricopa, and Sosna. Id. at 58-59. The law was struck down merely because it was related to "no valid state interests which are rationally served by the distinction it makes." Id. at 65. Since the statute could not pass the minimum rationally test the Court expressly reserved whether any enhanced scrutiny was called for because the law burdened fundamental rights. Id. at 61.

The next right-to-travel case of the 1980's was Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985). There, a New Mexico property tax exemption for Viet

Nam veterans was limited to veterans who had been residents of New Mexico before May 8, 1976. The court found the past residency requirement was not even rationally related to the state's two asserted interests. With regard to the state's most substantial interest - rewarding veterans who entered or left the military service from or to New Mexico - the Court appeared to apply a close-fit level of scrutiny.

In Atty. Gen. of New York v. Soto-Lopez, 476 U.S. 898 (1986), the contested statute concerned New York's veteran's preference in civil service employment to veterans who had been New York residents at the time they entered the military service. The plurality opinion by J. Brennan applied strict scrutiny on the basis of a right-to-travel theory. The fifth and sixth votes

reviewed the contested statute under the rational relationship test used in Zobel.

From a review of the Supreme Court cases cited above it is difficult to determine the type and severity of deprivation which implicates strict scrutiny under the right to travel branch of equal protection. One common thread is conditioning the receipt of a benefit on a form of in-state residency. The contested rule does not contain a Pennsylvania durational residency requirement. Rule 203(a)(2)(ii) only applies if an attorney is a member of the bar of a reciprocal state. Furthermore, a fundamental right is not involved and Rule 203(a)(2)(ii) does not involve a suspect classification. See Edelstein v. Wilentz, 812 F.2d 128, 131-132 (3d Cir. 1987) (There is no fundamental right to practice of law.). As is

discussed below, Pennsylvania has a valid state interest in maintaining reciprocity with its sister states. Although persons similarly situated to plaintiffs may be reluctant to move to Pennsylvania, we do not believe that the practical effect of Rule 203(a)(2)(ii), inability to practice law in Pennsylvania, restricts plaintiffs' freedom of movement to such a degree that Pennsylvania must have a compelling interest for the rule. We agree with the magistrate that Rule 203(a)(2)(ii) may stand if it is rationally related to a legitimate state goal.

Plaintiffs challenge the Rule 203(a)(2)(i) on the basis that it is not designed to obtain a mutuality of benefits for Pennsylvania's attorneys. As stated above, the classification concerns attorneys who have graduated from non-ABA

approved law schools, are members of the state bar and have practiced continuously in the state for five years. Those attorneys who have practiced in a reciprocal state may sit for the bar examination while those from non-reciprocal states may not.

Reciprocity provision "represent a state's undertaking to secure for its citizens an advantage by offering the advantage to citizens of any other state on condition that the other state make a similar grant." Hawkins v. Moss, 503 F.2d 1171, 1176-1177 (4th Cir. 1974). States have a legitimate interest in securing reciprocal rights for their citizens. Id. This interest is unrelated to the competence of its bar. Goldsmith v. Pringle, 399 F. Supp. 620, 624 (D. Col. 1975).

Threshold requirements for admission to a state's bar "must be related to the singular objective of ensuring that attorneys are honest and proficient in the basis skills and knowledge of their profession." Id. at 625. Rule 203(a)(2)(i) of the Pennsylvania Bar Admission Rules requires that all applicants wishing to sit for the bar examination have graduated from an ABA approved law school. That an applicant comes from a non-reciprocal state does not result in the denial of a license.

The notion of reciprocity usually concerns whether or not an attorney can waive the state's bar examination and motion in. Pennsylvania's reciprocity provisions are somewhat different. Rather than waive the bar examination for all experienced attorneys practicing in reciprocal states, it permits graduates of

ABA approved schools to motion in (Pa. B.A.R. 204) and graduates of non-ABA approved schools to sit for the bar examination (Pa.B.A.R. 203(a)(2)(ii)). The practical result is to ease the burden of relocation of experience attorneys from reciprocal states.

Pennsylvania has a legitimate interest in facilitating the relocation of its citizens. Rule 203(a)(2)(ii) encourages reciprocal states to lessen the burdens of relocation of Pennsylvania attorneys by reducing the burdens of admission to the Pennsylvania bar only to those attorneys from reciprocal states. Goldsmith, 399 F. Supp. at 623. The fact that experienced attorneys from non-reciprocal states are treated differently from those admitted to the bars of reciprocal states does not render Rule 203(a)(2)(ii) invalid. See Id.

at 624; Salibra v. Supreme Court of Ohio, 730 F.2d 1059 (6th Cir. 1984) ("[a] plaintiff does not state a claim under equal protection clause by showing that he has not been granted a particular privilege, when the privilege may be granted to others similarly situated.").

Plaintiffs contend that treating graduates of foreign law schools more favorably than non-ABA approved domestic law school graduates is violative of the equal protection clause. Rule 205 of the Pennsylvania Bar Admission Rules applies to graduates of law schools not encompassed by the accreditation activities of the ABA. Rule 205 permits certain graduates of foreign law schools to sit for the bar examination after having completed 24 credit hours in 16 subjects in an accredited American law school.

It is not clear that equal protection analysis should apply in the first instance to a comparison of American non-ABA accredited law school graduates with graduates of foreign law schools. By definition a foreign law school is not within the ABA's authority. A person who attends law school in a foreign country does not have the choice to attend an ABA-accredited institution whereas in the United States that choice exists. Thus, graduates of foreign law schools are not similarly situated to graduates of non-ABA approved law schools.

Even if we were to apply a rational relationship test, Rule 205 would survive. Pennsylvania has a substantial interest in maintaining a competent bar and protecting the public. ABA-law school approval has been an accepted means of ensuring

competency. Where ABA accreditation does not reach because of a law school's location, Pennsylvania has made a rational distinction between graduates of foreign law schools and graduates of domestic law schools. Rather than having a flat prohibition against graduates of foreign law schools, Pennsylvania has formulated a rational procedure directed at securing competent graduates of foreign law schools who wish to practice in the Commonwealth.

An order follows.

BARRON P. McCUNE
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DANA SCHUMACHER and LEROY HODGE,

Plaintiffs,

vs.

ROBERT N. NIX, JR., et al.,

Defendants.

Civil Action No. 90-1431

O R D E R

AND NOW, August 27, 1991, having reviewed the Magistrate Judge's Report and the objections thereto, we accept the recommendation of the United States District Court Magistrate Judge. The motion for summary judgment of plaintiffs is denied. Defendants' motion for summary judgment is granted.

BARRON P. McCUNE
SENIOR UNITED STATES DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1431

DANA SCHUMACHER and LEROY HODGE,

Plaintiffs,
v.

ROBERT N. NIX, JR., et al.,

Defendants.

REPORT

GARY L. LANCASTER
United States Magistrate Judge
May 20, 1991

This is an action for declaratory and injunctive relief under the provisions of the Civil Rights Act of 1871, 42 U.S.C. §1983. Plaintiffs contend that they are denied the opportunity to sit for the Pennsylvania Bar examination in violation of the due process and equal protection clauses of the fourteenth amendment, U.S.

Const. amend. XIV, and rights secured by the privileges and immunities clause of the United States Constitution. Id., art. IV, § 2. Before the court are the parties' cross motions for summary judgment. For the reasons set forth herein, plaintiffs' motion should be denied and defendants' motion granted.

I. FACTS

The material facts are not in dispute. Plaintiffs are graduates of the Peoples College of Law located in Los Angeles, California. Peoples College has not sought nor obtained accreditation from the American Bar Association ("ABA"). Upon graduation, each plaintiff met the criteria for admission to the California bar--which does not require graduation from an ABA accredited law school--and were duly

admitted to practice in that state. Thereafter, each practiced law in California for at least five years.

Both plaintiffs have now moved to Pennsylvania and both have been admitted to practice before the United States District Court for the Western District of Pennsylvania, the United States Court of Appeals for the Third Circuit and the United States Supreme Court. Plaintiffs now seek to sit for the Pennsylvania Bar examination in order to gain admission to the Pennsylvania Bar, but for the reasons set forth herein, are precluded from doing so. Hence this suit.

II. STANDARD OF REVIEW

Rule 56(c) permits a court to render summary judgment if it is "show[n] that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Nevertheless, "when a motion is made and supported, the nonmoving party must produce specific facts showing that there is a genuine issue for trial, rather than resting upon the assertions of pleading." Jersey Central Power & Light Co. v. Township of Lacey, 722 F.2d 1103,1109 (3d Cir. 1985). cert. denied, 475 U.S. 1013 (1986); see Celotex Corp v. Catrett, 477 U.S. 317 (1986). Assertions in the form of legal conclusions are insufficient to create issues of material fact that would preclude summary judgment. Securities &

Exchange Comm'n v. Bonastia, 614 F.2d 908, 914 (3d Cir. 1980).

III. DISCUSSION

A.

The general requirements for admission to the Pennsylvania Bar are set forth in Rule 203 of the Pennsylvania Bar Admission Rules. The Rule sets forth two general requirements which an applicant must meet before being admitted. First, the applicant must have graduated from a law school accredited by the American Bar Association, Rules 203(a)(2)(i), and 102(a); and second, an applicant must take and pass a written examination administered by the Pennsylvania Board of Law Examiners. Rule 203(b). Unless an applicant has graduated from an ABA accredited law school, he or she may not sit for the required

examination. Since Plaintiffs are not graduates of an ABA accredited law school, they are ineligible to sit for the Bar examination under the general provision.[1]

Nonetheless, under Rule 203(a)(2)(ii), Pennsylvania will waive the educational requirement and permit a graduate of a non-ABA accredited law school to sit for the examination provided the applicant is already a member of the bar of a state that

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[1]. Plaintiffs do not challenge Pennsylvania's general requirement of an ABA approved education. Nor would such a challenge prove valid. Pennsylvania is among the majority of states that, as a general requirement, limit admission to graduates of ABA approved law schools. Those cases which have addressed this question have held, without exception, that a state's requirement of an ABA approved education does not violate any federally protected right of non-ABA accredited graduates. See Potter v. New Jersey Supreme Court, 403 F. Supp. 1036 (D.N.J. 1975), aff'd 546 F.2d 418 (3d Cir. 1976); Supp. 1036 (D. N>J> 1975), aff'd 546 F.2d 418 (3d Cir. 1976): Huffman v. Montana Supreme Court, 372 F. Supp. 1175 (D. Mont.), aff'd 419 U.S. 955 (1974).

has a reciprocal agreement with Pennsylvania, and has practiced law in that reciprocal state for a period of five years. Pennsylvania does not have a reciprocal agreement with California, thus, plaintiffs are also ineligible to sit for the examination under Rule 203(a)(2)(ii). It is this subsection of the Rule which plaintiffs challenge as unconstitutional.

Plaintiffs challenge Rule 203(a)(2)(ii) because it waives the requirement of an ABA accredited education for those applicants who are members of the state bar of a reciprocal state, but it will not waive that requirement for similarly educated applicants who are members of the bar of a nonreciprocal state. Plaintiffs contend that such a distinction is not rationally related to a

valid state objective, and thus, violates their right to equal protection of the law. [2]

B.

We begin the analysis with certain longstanding and uncontested principles applicable to this area of law. First,

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[2]. Plaintiffs initially contended that Rule 203(a)(2)(ii) also violated the privileges and immunities clause and due process of law. We need not dwell on these claims. The privileges and immunities clause was designed to "insure to a citizens of State A who ventures into State B the same privileges which the citizens of State B enjoy." Lutz v. York, 899 F.2d 255, 262 (3d Cir. 1990) (citing Toomer v. Witsell, 334 U.S. 385, 395 (1948). Here plaintiffs do not contend that they are being treated differently than similarly situated Pennsylvania residents. On the contrary, it is because they must meet the same educational requirements which Pennsylvania residents are obliged to meet which forms the basis of this suit. Plaintiffs virtually conceded as much at oral argument. Plaintiffs also acknowledged that their due process claim is substantive in nature, thus susceptible to the equal protection analysis.

each state has the inherent authority to establish for itself what criteria an attorney must meet before being admitted to the bar of that state. Hawkins v. Moss, 503 F.2d 1171, 1175 (4th Cir. 1974), cert. denied, 420 U.S. 928 (1975) (citing authorities). That an attorney meets all the criteria of and has even been admitted to the bar of one state has no inherent force or effect on whether he or she will be admitted to the bar of another state. Id. at 1176. Each state has the authority to require the applicant to meet its criteria, independent of what a sister state may require. Id. See generally Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474, 476 n. 5, 477 n.7 (7th Cir. 1974). The criteria can not be arbitrary or promote invidious discrimination, but as long as the criteria

are reasonably related to a valid state objective, they do not offend any federally protected rights of those that do not meet

the criteria.[3] Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

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[3]. Plaintiffs contend that the classification at issue penalizes their right to travel, a recognized constitutionally protected right, and thus, the Commonwealth must show the classification is necessary to promote a compelling governmental interest. They cite Shapiro v. Thompson, 394 U.S. 618, 634 (1969), and other cases. However, as explained in Shenfield v. Prather, 387 F. Supp. 676, 683-86 (N.D. Miss. 1974, following Huffman v. Montana Supreme Court, 372 F. Supp. 1175, restrictions on the ability to practice law do not infringe the right to interstate travel and thus are not subject to strict scrutiny. See also Goldsmith v. Pringle, 399 F. Supp. 620, 627 n. 7 (D. Colo 1975) (reciprocity agreement does not impinge on right to travel).

Moreover, the courts have consistently held that there is no constitutional or inherent right to practice law. Thus, state bar admissions rules do not offend equal protection if the rules are reasonably related to a valid state objective. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Sturm v. Clark, 835 F.2d 1009, 1016-17 (3d Cir. 1987) (citing authorities); Sestric v. Clark, 765 F.2d 655 (7th Cir. 1985), cert. denied, 474 U.S. 1906; Murphy v. State Board of Law Examiners, 429 F. Supp. 16, 18 (E.D. Pa. 1977).

The courts are not unfamiliar with equal protection challenges to state bar admission rules that wave one or more of the general requirements for admission for applicants from reciprocal states, but not for applicants from nonreciprocal states. This issue has been raised in numerous lawsuits. The equal protection challenge in prior cases--as in part here-- is that a difference in treatment based on whether reciprocal agreements do or do not exist between the similarly situated applicants' home states, is not reasonably related to the state's objective in assuring the competency of those it admits to its bar. That may be so and courts have held as much. See Goldsmith v. Pringle, 399 F. Supp. 620, 625 (D. Colo. 1975); see also Brown v. Supreme Court of Virginia, 359 F.

Supp. 549 (E.D. Va.), aff'd 414 U.S. 1034 (1973).

However, unlike the general bar admission requirements, assuring competency of the bar is not the state objective advanced by reciprocity agreements. The objective advanced by reciprocity agreements is to obtain a mutuality of benefits for that state's attorneys. Specifically, a state's reciprocity provision secures for its attorneys who decide to relocate, the advantage of favorable terms of admission to another state's bar by offering that same advantage to attorneys of such other states that will reciprocate. This, of course, results in the state treating similarly qualified attorney applicants differently based on whether they came from a reciprocal or non-reciprocal state. Yet, the courts that

have addressed this objective have, without exception, held that it is sufficiently valid to warrant the difference in treatment and passes equal protection muster. See Hawkins v. Moss, 503 F.2d at 1177-78; Shenfield v. Prather, 387 F. Supp. 676 (N.D. Miss. 1974); Knowlton v. Board of Law Examiners, 513 S.W.2d 788, 792 (Tenn. 1974); Lane v. West Virginia State Board of Law Examiners, 295 S.E. 2d 670 (W.Va. 1982) (concurring opinion). See also Goldsmith v. Pringle, 399 F. Supp. 620.

Plaintiffs seek to distinguish the reciprocity cases by contending that, in the traditional case, the admission requirement sought to be waived by the applicant from the nonreciprocal state was the requirement of having to sit for the competency examination. In those cases, even without the waiver, the applicant was

still not completely precluded from admission, he or she simply had to sit for and pass the examination. Here, the requirement sought to be waived is graduation from an ABA accredited law school. Plaintiffs proffer that because Pennsylvania refuses to waive the educational requirement for them, they cannot even sit for the examination, completely precluding them from admission to the Pennsylvania bar. Thus, according to plaintiffs, this case is more egregious than and distinguishable from the typical reciprocity case.

In support of their argument, plaintiffs direct us to language and abstraction primarily gleaned from authorities which have either invalidated, or referred to authorities which have invalidated, a state bar's residency

requirement.[4] Those cases generally hold that a residency requirement that completely precludes non-residents from admission to the bar, but does not advance the state's objective in assuring the integrity and competency of the bar, violates equal protection and/or the privileges and immunities clause.

Plaintiffs' authorities and arguments are inappropriate to the issue here. Plaintiffs are correct that they are

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[4] Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 179 (1985) (residency requirement violates privileges and immunities); Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988) (residency requirement violates privileges and immunities); Lowrie v. Goldenhersh, 716 F.2d 401, 412 (7th Cir. 1983) (court referred to cases which struck down on equal protection grounds bar admission rules which required applicants to reside in the licensing state for one year prior to bar application). See also A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976) (struck down reciprocity provision that prohibits, rather than regulates, interstate commerce).

effectively precluded from admission to the Pennsylvania Bar; yet, any threshold requirement serves as an absolute bar to those who do not meet it. However, unlike the residency requirement cases, plaintiffs' preclusion is not a result of the challenged Rule. Plaintiffs are precluded because they fail to meet Pennsylvania's threshold educational requirement. That Pennsylvania will waive this obstacle for others but not for them does not ipso facto violate equal protection. It simply means that the difference in treatment must advance a valid state objective.

In other words, there is a clear distinction that can be drawn, both in law and in logic, between striking down a preclusive residency requirement because it does not advance a valid state objective,

and on the other hand, upholding this Rule which waives the normal educational requirement for some applicants in order to advance a valid state objective. Unlike a residency requirement, waiving the educational requirement for attorneys from reciprocal states represents a difference in treatment which is rationally related to a valid state objective, i.e. gaining the mutual benefit for Pennsylvania's similarly educated attorneys. That plaintiffs are not among those benefitting from the Rule does not invalidate the Rule.

We also reject plaintiffs argument that they are precluded from taking the examination because they formerly lived and practiced in the non-reciprocal state of California. This is not so. Plaintiffs are precluded from sitting for the examination because they do not meet

Pennsylvania's threshold educational requirement. Nothing in the Pennsylvania Bar Admission Rules prohibits California attorneys from sitting for the Pennsylvania bar examination, but they must meet Pennsylvania's educational requirement--not California's--before doing so. Nor are we swayed by plaintiffs' recurring theme that they could now sit for the Pennsylvania Bar examination had they been admitted to and practiced for five years in a reciprocal state, rather than California. This is true. However, this truism carries with it no greater legal significance than the equally true observation that they could now sit for the Pennsylvania Bar exam had they attended an accredited law school, rather than Peoples College. Both statements are true, but neither

establishes a violation of equal protection.

Plaintiffs next argue that assuming that the system of reciprocity is generally related to the valid state objective of obtaining a mutuality of benefits for the respective states' similarly situated attorneys, Rule 203(a)(2)(ii) does not advance that objective. Plaintiffs contend that since California allows non-ABA graduates to sit for the bar, it already accommodates Pennsylvania's non-ABA graduates. According to plaintiff, Pennsylvania's true objective in promulgating Rule 203(a)(2)(ii) is not to confer a benefit to "its few Pennsylvania lawyers"[5] who are not ABA accredited law

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[5] The ABA accreditation requirement was not made an explicit part of Pennsylvania's Bar admission rules until 1971. 441 Pa xxxi. Prior to that, the rules required only that the applicant graduate from an

school graduates, but to somehow force California into entering a reciprocity agreement with Pennsylvania which would run solely to the benefit of Pennsylvania's ABA accredited law school graduates. Specifically, plaintiffs aver that the true purpose of the Rule is to pressure California into granting Pennsylvania's ABA graduates a waiver from having to sit for the California bar examination should any choose to relocate there.

The existence of such a cryptic motive underlying Rule 203(a)(2)(ii) is totally unfounded in the record. Plaintiffs have

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"approved" law school. Additionally, there are certainly non-ABA graduates from reciprocal states, who initially gained admission to the Pennsylvania Bar through Rule 203(a)(2)(ii). Therefore, although the record is silent as to the number of Pennsylvania attorneys who did not graduate from ABA accredited law schools, we cannot conclude as factually established, that this class of attorneys is so "few," as to mock the apparent purpose of the rule.

submitted absolutely no evidence that would support such a finding. Nor is there a factual basis to support plaintiffs' proposition that Rule 203(a)(2)(ii) does not, nor was it intended to, benefit the class of Pennsylvania lawyers it purports to benefit. It is fundamental that a party may not rely on unsupported allegations to defeat a motion for summary judgment. Celotex Corp. v. Catrett, 477 U.S. 313 (1986). It is equally fundamental that unsworn statements of purported fact made by counsel in briefs do not meet the requirements of Rule 56 and are insufficient to repel summary judgment. Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990).

Moreover, even if we accept that the number of non-ABA graduates practicing in Pennsylvania and who might benefit from the

reciprocity provisions of Rule 203(a)(2)(ii) is small that does not, as a matter of law, render illegitimate the state's valid objective in conferring upon that small group the benefits of reciprocity.[6] Neither law nor logic compels that conclusion.

IV. CONCLUSION

We have carefully considered all of plaintiffs' arguments, including those relating to the treatment Pennsylvania

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[6] Plaintiffs also point out that several states who have a reciprocal relationship with Pennsylvania do not, under any circumstances, admit graduates of non-ABA accredited schools. Thus, as to these states, Pennsylvania has granted their non-ABA graduate practicing attorneys a greater benefit than is being granted in return. However, this argument fails to consider that those states, by definition, do not have non-ABA graduate practicing attorneys. Thus, Rule 203(b)(2)(ii) is moot as to those reciprocal states.

affords to graduates of foreign law schools, the deterrent impact the disputed Rule may have on non-ABA accredited graduates' decisions whether to migrate to Pennsylvania, and that Rule 203(a)(2)(ii) is apparently unique among the states. Although plaintiffs' arguments are extensive and well stated, we find them to be without merit.

Finally, we are not unsympathetic to plaintiffs. We have no reason to dispute that they are, as proffered, intelligent individuals who could competently practice law in the Commonwealth of Pennsylvania. However, it is not our function to question the wisdom or even the harshness of Pennsylvania's rules for admission to its bar. Our inquiry is limited solely to whether the rules violate some federally protected right. We conclude that they do

not. Therefore, defendants' motion should be granted, plaintiffs' motion denied.

United States Magistrate Judge

Dated: May 20, 1991

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3666

DANA SCHUMACHER, LEROY HODGE,

Appellants,

v.

ROBERT N. C. NIX, JR., et al.

(D.C. Civ. No. 90-1431)

SUR PETITION FOR REHEARING

July 8, 1992

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO and ROTH, Circuit Judges, and DEBEVOISE*, District Judge

*As to panel rehearing only.

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

_____
Circuit Judge

Dated: July 8, 1992

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3666

DANA SCHUMACHER, LEROY HODGE,

Appellants,

v.

ROBERT N. C. NIX, JR., et al.

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civ. No. 90-1431)

June 3, 1992

Present: Greenberg and Scirica, Circuit Judges, and Debevoise, District Judge

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel April 6, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered August 27, 1991 granting defendants' motion for summary judgment, be, and the same is hereby affirmed. Costs taxed against the appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Appendix F

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IV, Section II(1) of the Constitution of the United States:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

APPENDIX G

RELEVANT PENNSYLVANIA BAR ADMISSION RULES

RULE 203. ADMISSION OF GRADUATES OF ACCREDITED AND UNACCREDITED INSTITUTIONS

(a) **Bar Examination.** The general requirements for permission to sit for the bar examination are:

(1) Receipt of an undergraduate degree from an accredited college or university or the receipt of an education which, in the opinion of the Board, is the equivalent of an undergraduate college or university education.

(2)(i) Except as provided in subparagraph 2(ii) of this Rule, completion of the study of law at and receipt without exception of an earned Bachelor of Laws or Juris Doctor degree from an accredited law school. See Rule 205 (relating to admission of graduates of foreign institutions) for standards applicable to graduates of foreign law schools; or

(ii) Completion of the study of law at and receipt without exception of an earned Bachelor of Laws or Juris Doctor degree from an unaccredited law school located within the boundaries of the United States of America, provided that the applicant is a member of the bar of a reciprocal state and meets the following qualifications:

(A) Presentation of a certificate from the highest court or

agency of such state having jurisdiction over admission to the bar and the practice of law stating that the applicant is in good standing at the bar of such court or such state.

(B) Presentation of proof satisfactory to the Board that the applicant, while continuously engaged in the practice of law in any state or states outside of this Commonwealth and subsequent to admission in a reciprocal state, has for a period of five years;

(i) practiced law in a reciprocal state or states outside this Commonwealth; or

(ii) engaged full-time in the teaching of law at one or more accredited law schools in the United States; or

(iii) served on active duty in the United States military service, as a judge advocate or law specialist, as those terms are defined in the Uniform Code of Military Justice, 10 U.S.C. Sec. 801, as amended, regardless of the location of the service.

Service under subparagraphs (i), (ii) and (iii) may be combined to satisfy the five year service requirement of this Paragraph.

(3) Absence of prior conduct by the applicant which in the opinion of the Board indicates character and general

qualifications (other than scholastic) incompatible with the standards expected to be observed by members of the bar of this Commonwealth.

(b) **Admission to the Bar.** The general requirement for admission to the bar of this Commonwealth is satisfactory completion of the bar examination administered by or under the authority of the Board.

Amended effective April 25, 1980; amended December 17, 1981, effective 30 days after January 9, 1982; amended effective June 30, 1983; August 22, 1986.

RULE 205. ADMISSION OF GRADUATES OF FOREIGN INSTITUTIONS

(a) **General Rule.** The Board, under such standards, rules and procedures as it may prescribe, may extend the provisions of Rule 203 (relating to the admission of graduates of accredited and unaccredited institutions) to any applicant who has completed the study of law in a law school which at the time of such completion was not located within the geographical area encompassed by the accreditation activities of the American Bar Association and:

(1) who has been admitted to practice law in and is in good standing at the bar of a foreign country, as evidenced by a certificate from the highest court or agency of such foreign country having jurisdiction over admission to the bar and the practice of law or

(2) who is a citizen of the United States of America and because of such citizenship is not eligible for admission to the practice of law in such foreign country.

(b) **Law Study Required.** Unless otherwise provided the Board, applicants who meet the provisions of subparagraphs (a)(1) or (a)(2) of this Rule may apply to sit for the Pennsylvania Bar Examination provided they have successfully completed 24 credit hours in an accredited American law school. These 24 credit hours must be taken in the following subjects: Conflicts of Law; Constitutional Law; Contracts;

Corporations; Criminal Law; Decedents' Estates; Evidence; Family Law; Federal Civil Procedure; Federal Income Taxes (personal only); Professional Responsibility; Real Property; Torts; Uniform Commercial Code, Art. II - Sales; Uniform Commercial Code, Art. III - Commercial Paper; Uniform Commercial Code, Art. IX - Secured Transactions. No more than 4 credit hours in any one subject shall be counted toward this requirement.

Amended December 17, 1981, effective 30 days after January 9, 1982; amended effective August 22, 1986.

Supreme Court, U.S.
FILED
DEC 16 1992
OFFICE OF THE CLERK

No. 92-649

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DANA SCHUMACHER AND LEROY HODGE,
Petitioners

v.

ROBERT N.C. NIX, JR., ET AL.
Respondents

Petition for Writ of Certiorari to The
United States Court of Appeals
For the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit where the Circuit Court held that Pennsylvania may constitutionally preclude non-ABA accredited law school graduates from sitting for the Pennsylvania bar examination unless those graduates are members of the bar of a reciprocal state?

PARTIES TO THE PROCEEDING

The parties to the proceedings below are correctly set forth by Petitioner. However, James T. McDermott, Justice of the Supreme Court of Pennsylvania, is deceased. Frank J. Montemuro has succeeded to the position of Justice of the Supreme Court of Pennsylvania formerly held by the late Justice McDermott. In accordance with Rule 35.3, Supreme Court Rules, Justice Montemuro is automatically substituted as a party for the purposes of proceedings in this Court.

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No. 92-649

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DANA SCHUMACHER AND LEROY HODGE,
Petitioners

v.

ROBERT N.C. NIX, JR., ET AL.
Respondents

Petition for Writ of Certiorari to The
United States Court of Appeals
For the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Robert N.C. Nix, Chief Justice of the Supreme Court of Pennsylvania, *et al,* (Respondents), respectfully oppose Petitioners' writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the Court of Appeals for the Third Circuit dated July 8, 1992, denying rehearing, has not been reported and is reproduced in Petitioners' Appendix D at A-73 and A-74.

The Opinion and Judgment Order of the Court of Appeals for the Third Circuit is reported at 965 F. 2d 1262, and is reproduced in Petitioners' Appendix A, at A-1

through A-28. The Opinion of the District Court has not been reported; it is reproduced in Petitioners' Appendix B at A-29 through A-47. The Report of the Magistrate has not been reported; it is reproduced in the Petitioners' Appendix C at A-48 through A-72.

STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Pennsylvania Bar Admission Rules at issue are set forth in Petitioners' Appendix at App. G, at A-78 through A-82. The Equal Protection Clause of the Fourteenth Amendment and the Article IV Privileges and Immunities Clause are set forth in Petitioners' Appendix. at App. F, at A-77.

STATEMENT OF THE CASE

Petitioners are graduates of a non-ABA accredited law school, and have practiced law for five or more years in California, a state which does not grant reciprocity to Pennsylvania lawyers.

Pennsylvania's general rule is that only graduates of ABA-accredited law schools may sit for the Pennsylvania Bar Examination. Pa. B.A.R. 203 (a)(2)(i). The sole exception is for graduates of non-ABA accredited law schools who are members in good standing of the bar of a state which holds a "reciprocal" agreement with Pennsylvania, and who have practiced law in that reciprocal state for five years.

Thus, Pennsylvania's provision waives the threshold educational requirement for admission for applicants from reciprocal states, but not for applicants from nonreciprocal states. The lower courts found no impingement of a fundamental right, no suspect classification, and determined that the state advanced a valid state objective for the rule.

REASONS FOR DENYING WRIT

A. No "special and important" reasons exist for granting the writ of certiorari.

A review on writ of certiorari is a matter of judicial discretion, and will be granted "only when there are special and important reasons therefore." Rule 10.1, Supreme Court Rules. These "special and important reasons" include: a conflict between United States courts of appeal on the same matter; a conflict between a state court of last resort and a United States court of appeals; when a state court or United States court of appeals decides a question of federal law in a way which conflicts with an opinion of the United States Supreme Court; or where a United States court of appeals has decided an important question of federal law which "should" be settled by the United States Supreme Court. Rule 10.1 (a)-(c), Supreme Court Rules. Although the list is not exhaustive, none of these issues is present in this case, and Petitioners' asserted reasons do not merit this Court's grant of certiorari.

Mr. Chief Justice Taft, speaking for a unanimous court, has stated:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which are important to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion between the Circuit Courts of Appeals." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955), citing *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923).

Petitioners offer no compelling reason as to why this Court should grant certiorari. Without exploring the merits of the case, the instant response will address Petitioners' arguments in support of certiorari *seriatim*, in accordance with the numbered paragraphs set forth in the Petition.

1. **The Opinion of the Circuit Court is consistent with precedent.**

The Opinion of the Third Circuit Court of Appeals does not conflict with Supreme Court decisions cited by Petitioners which would require strict scrutiny of the challenged Pennsylvania Bar Admission Rule.

Pennsylvania's general rule, as noted above, is that only graduates of ABA-accredited law schools may sit for the Pennsylvania Bar Examination. Pa. B.A.R.203 (a)(2)(i). The sole exception is for graduates of non-ABA accredited law schools who are members in good standing of the bar of a state which holds a "reciprocal" agreement with Pennsylvania, and who have practiced law in that reciprocal state for five years.

Thus, Pennsylvania's provision waives the threshold educational requirement for applicants from reciprocal states, but not for applicants from nonreciprocal states. This difference in treatment must advance only a valid state objective; it does not involve a suspect classification or invidious discrimination, or impinge on any fundamental right which would trigger stricter scrutiny.

There is no inherent right to practice law in the state courts until the individual applicant has established the requisite qualifications prescribed by the state. *In re Lockwood*, 154 U.S. 116 (1894). A license to practice law granted in one state does not confer an absolute right to practice law in another state. *Hawkins v. Moss*, 503 F.2d 1171, 1175-76 (4th Cir.), *cert. denied*, 420 U.S. 928 (1974). Neither general principles of comity nor any constitutional provision require the respective states to admit to their bars attorneys admitted in other jurisdictions. *Id.* States have both a duty and a right to regulate the practice of professions within their borders; federal courts should not interfere with such internal regulations unless those regulations invidiously discriminate against a certain class of citizens, or are in no way related to a legitimate state purpose.

a. **The Opinion of the Circuit Court does not conflict with this Court's decision in *Schware*.**

A state's professional licensing statute is deemed constitutional if it is rationally related to a valid state objective. *Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232 (1957). The decisions of the lower courts do not, as Petitioners argue, contravene *Schware*. Petitioners are excluded from sitting for Pennsylvania's Bar Examination not because they are "Republican" or "Negro" or "member[s] of a particular church." *Id.* 353 U.S. at 239. Petitioners are excluded because they do not meet the threshold educational requirement, nor come under the sole exception to that requirement. *Schware* did not address reciprocity, nor did it preclude reciprocity as a criterion.

b. **The right to travel analysis articulated by the Circuit Court comports with this Court's decisions.**

The Opinion of the Circuit Court is not in conflict with those opinions of the United States Supreme Court cited by Petitioners. Those decisions hold that durational residency requirements to obtain various governmental entitlements denied equal protection of the law to persons exercising their right to interstate travel. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), *Zobel v. Williams*, 457 U.S. 55 (1982); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986). The instant case does not present a residency requirement of any kind. Moreover, the Circuit Court recognized and reviewed each of the cases cited by Petitioners, and satisfied itself that its right to travel analysis in the instant case was in accord with this Court's precedent as cited by Petitioners. Appendix, A-9 through A-16.

c. The Opinion of the Circuit Court does not conflict with rulings of other circuit and district courts.

While at one time, bar admissions standards varied substantially from state to state, the present principal distinction is among those states which allow non-ABA accredited law graduates to sit for their bar examination, and those which require graduation from an ABA-accredited law school in each instance, without exception. Either of these paths meets constitutional requirements; no conflict exists between those lower courts which have considered this issue.[1] Pennsylvania's rule, which treads a middle path to encourage reciprocity, is not unconstitutional for doing so, particularly since, as the lower courts noted, Pennsylvania is entitled to bar all graduates of non-accredited law schools from sitting for the

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1. The federal courts have consistently rejected constitutional attacks upon the requirement of state bars that their members be graduates of ABA accredited law schools. *Huffman v. Montana Supreme*, F. Supp. 1175 (D. Mont. 1974) (three judge court) *aff'd*, 419 U.S. 955 (1974); *Wessel v. Pennsylvania Board of Law Examiners*, 442 U.S. 907 (1979), *dismissing appeal for want of substantial federal question*, 327 Misc. Dkt. 21 (Penna. Jan. 4, 1979); *In re Application of Hansen*, 441 U.S. 938 (1972), *dismissing appeal for want of substantial federal question*, 275 N.W. 2d 790 (Minn. 1978); *see generally, Hicks v. Miranda*, 422 U.S. 332 (1975). [Dismissal for want of substantial federal question is a decision on the merits.] *Hackin v. Lockwood*, 361 F.2d 499 (9th Cir. 1966); *Lombardi v. Tauro*, 470 F.2d 798 (1st Cir. 1972), *cert. denied*, 412 U.S. 919 (1977); *Moore v. Supreme Court of South Carolina*, 447 F.Supp 527 (D.S.C. 1977), *aff'd*, 577 F.2d 735 (4th Cir. 1978); *cert. denied* 439 U.S. 984 (1978); *Donnelly v. Boston College*, 558 F.2d 634 (1st Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 987 (1977).

Other precedent from which review was not sought but which upholds the accreditation requirement include, *inter alia: Shenfield v. Prather*, 387 F. Supp. 676 (N.D. Miss. 1974) (three judge court); *Potter v. New Jersey Supreme Court*, 403 F. Supp. 1036 (D.N.J. 1975), *aff'd mem.* 546 F.2d 418 (3rd Cir. 1976); *Murphy v. Egan*, 498 F.Supp. 240 (E.D. Pa. 1980); *Murphy v. State Board of Law Examiners*, 429 F. Supp. 16 (E.D. Pa. 1977); *Pappanastos v. Board of Trustees, etc.*, 615 F.2d 219 (5th Cir. 1980); *Harris v. Louisiana State Supreme Court*, 334 F. Supp. 1289 (E.D. La. 1971).

bar examination in Pennsylvania—and such graduates are in fact barred in many states.[2]

While the petition for certiorari does not address the issue, Petitioners argued below that the contested Pennsylvania rule was unique among the states. Indeed, the Magistrate's Opinion noted and refused to give credence to that argument. (Appendix, at A-71). Petitioners now downplay the limited application of this bar admission rule in order to persuade this Court to grant certiorari. The rule, affects few persons, and is hardly, therefore, an issue so greatly affecting the public that it merits this Court's review. Simply stated, the issue and its limited ramifications are not "important" enough to receive this Court's review.

d. Pennsylvania Bar Admission Rule 203 does not violate the Privileges and Immunities Clause of Article IV of the Constitution.

Pa. B.A.R. 203 (a) (ii) does not have a disproportionate impact on the practice of law by citizens of the several states who are not residents of Pennsylvania, since the Rule raises no barrier to admission to the bar by nonresident attorneys in order to favor resident attorneys. It erects no "fences" against out of state lawyers . . . to protect in-state lawyers from professional competition. *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), n. 18. Pennsylvania resident attorneys who have not graduated from an ABA accredited school and who have not practiced law in a reciprocal jurisdiction, as required by the rule, are precluded from practicing in Pennsylvania on the same terms as non-resident attorneys.

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2. The Bar Admission Rules of the fifty states are of record below. It would appear that the following states do not allow any exceptions to their requirement that only ABA-approved law graduates may sit for the bar examination: Arizona, Arkansas, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, and Wisconsin.

Moreover, the rule does not prohibit the practice of law in Pennsylvania by nonresidents. In fact, Pennsylvania's rule accommodates the present mobility of the nation's population, leaving untouched the rules of those states which allow no reciprocal admission. Reciprocity is the lynchpin of mobility, and Pennsylvania's rule facilitates relocation by Pennsylvania and out-of-state attorneys.

e. **Pennsylvania's bar admission rule pertaining to graduates of foreign law schools is irrelevant to this Court's inquiry as to whether certiorari should be granted.**

Petitioners' argument as to graduates of foreign institutions raises a red herring, diverting attention from the classification drawn by the contested rule. The comparison of the rules admitting United States law graduates with a rule affecting a classification of graduates outside the purview of ABA accreditation should not be a basis for the grant of certiorari.

Rule 205, addressing the admission of foreign lawyers, is intended to apply only to law schools located without the geographical area encompassed by the accreditation activities of the A.B.A. As the Pennsylvania Supreme Court noted in *Appeal of Murphy* 482 Pa. 43, 393 A.2d 369 (1978), *cert. denied and appeal dismissed sub nom. Murphy v. Pennsylvania State Board of Bar Examiners,* 440 U.S. 901 (1979) at footnote 3:

> Because the ABA did not undertake to evaluate law schools situated outside of the United States, and because this Court was receiving applications from graduates of foreign law schools, our rule was amended . . . to allow a person to sit for the bar examination if he or she "shall have acquired a legal education which in the opinion of the State Board is the equivalent" of the education received in an ABA approved school. This provision was not intended to apply to schools

> located within the geographical area encompassed by the accreditation activities of the A.B.A. . . . 471 Pa. lxxix.

Petitioners have been afforded equal treatment vís a vís Pennsylvania attorneys who graduated from a nonaccredited law school, and who have not practiced for the requisite number of years in a reciprocal jurisdiction.

Indeed, as noted above, the requirement which prevents the instant petitioners from sitting for the bar examination is not more onerous than that imposed upon Pennsylvania natives and residents not admitted in other jurisdictions who, if not graduates of ABA accredited law schools, may not sit for the bar examination. *See Hawkins v. Moss, supra,* finding that, so long as a state does not subject a migrant attorney to more onerous requirements than those imposed on its own citizens, it cannot be said that the state has violated the Constitution.

2. The Opinion of the Circuit Court is not "at odds" with the functioning of our Federal Union.

Pennsylvania's rule, rather than preventing comity, as argued by Petitioners, fosters comity, and the Circuit Court so found.

Petitioners assert that certiorari should be granted because the implications of the decision of the Court of Appeals are "far-reaching."

Petitioners speculate that the Circuit Court's logic could be extended to enable Pennsylvania to "retaliate against California's requirement that all lawyers must take an examination," by refusing to permit California's doctors to practice in Pennsylvania without examination, requiring California to accept Pennsylvania's garbage, demanding that California provide tax breaks to Pennsylvanians, or imposing some other condition wholly unrelated to the practice of law. Petition, pp. 31-32. Such speculation is an illogical extension of the Circuit Court's decision. The Pennsylvania Bar Admission Rules affect lawyers and lawyer applicants only; nothing in the record—or in reason—

would lead to the conclusion that Pennsylvania's Supreme Court, which promulgated the rule, is waiting to step outside this circumscribed group of lawyers and lawyer applicants in an attempt to "coerce" California into a reciprocal agreement. The rule as written encourages reciprocity, which is a legitimate state purpose.

Moreover, the rule as promulgated possesses "some notion of parallelism or mutuality." The Circuit Court made clear that precise mutuality is not necessary, and that finding comports with the caselaw cited in the Circuit Court's Opinion.

The Circuit Court found that Petitioners simply framed Pennsylvania's reciprocity interest too narrowly, in that "Pennsylvania has a legitimate interest in securing mutual treatment for *all* its attorneys seeking admission to the bars of other states," whether from accredited or unaccredited law schools. (Circuit Court Opinion, at A-24).

Thus, despite the whirlwind of Petitioners' impassioned argument, this Court more properly abides by principles of comity and federalism by denying certiorari and refusing to second-guess the Pennsylvania Supreme Court's Bar Admission Rule as to graduates of non-accredited domestic law schools—even if this Honorable Court might prefer some other scheme. This is especially so in light of the deference generally accorded states "as to economic and social matters, and Pennsylvania's 'especially great' interest in regulating its bar." Circuit Court Opinion, at A-27, *citing Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975).

(a) **The Circuit Court properly found the contested classification constitutional.**

Petitioners' argument that graduates of non-ABA approved law schools from non-reciprocal states are held "hostage" by Pennsylvania's rule, does not merit this Court's grant of certiorari. The Circuit Court's Opinion does not suggest that the rule was intended to "harm" either unaccredited law graduates from Pennsylvania or unaccredited law graduates from other states; the Circuit

Court simply noted that precise mutuality or 'mathematical exactitude' in drawing classifications, is not required under the caselaw. Circuit Court Opinion, at A-26, A-27 citing *City of New Orleans v. Dukes,* 427 U.S. 297 (1976) (per curiam).

(b) **Pennsylvania's valid state interest in securing advantages for its lawyers has been articulated in accordance with the decisions of this Court.**

The policies underlying the bar admission rule "could conceivably" have been that policy of encouraging reciprocity which the Circuit Court found sufficient to pass constitutional muster. Nor is this Court's decision in *Nordlinger v. Hahn,* 505 U.S. __ , 120 L. Ed. 2d 1, (1992) to the contrary. *Nordlinger* clearly asserts that, for purposes of rational-basis review, the Equal Protection Clause does not require that the administrative or legislative body whose action is reviewed "actually articulate at any time the purpose or rationale supporting its classification." *Id.,* 120 L. Ed. at 16. That case requires that the legitimate state purpose "may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decision maker," and that requirement is met here. *Id.*

Respondents argued consistently and vigorously in each proceeding below, their right to formulate rules relating to bar admission, and their legitimate state purpose in securing advantages for Pennsylvania lawyers through reciprocity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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